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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1250

STANDARD OIL COMPANY,
Appellant,

vs.

ROBERT G. SHARPE, MOTOR VEHICLE COMPTROLLER, STATE OF MISSISSIPPI,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

A. OPINIONS BELOW

This case is an appeal from the decision of the Supreme Court of Mississippi validating a tax statute of the state over objections based upon provisions of the Constitution of the United States.

The opinion of the Supreme Court, entered October 13, 1975, is appended (Appendix G). See also: *Sharpe* v. *Standard Oil Co.*, 322 So.2d 457 (Miss. 1975).

Reports and opinions preceding the above consist of (1) the opinion of the Attorney General of Mississippi holding the tax to be invalid[1] (Apx. D); the opinion of the Motor Vehicle Comptroller,[2] holding the tax to be valid (Apx. E); opinion of the Chancery Court of Hinds County, Mississippi, holding the tax to be invalid[3] (Apx. F).

B. GROUNDS OF JURISDICTION

(i) **Nature of Proceedings:** The proceeding originated with a protest by appellant against the assessment and collection of an alleged tax for the privilege of selling diesel fuel (No. 2 oil) for use as an industrial heating agent.

Under Mississippi statutes, the disputed tax falls under the jurisdiction of the Motor Vehicle Comptroller, who, in this instance, assessed and sought to collect the tax and before whom the proceedings in protest were initiated as required by law, subject to appeal and review by the Chancery Court of Hinds County and the Supreme Court of Mississippi. Miss. Code 1972, §27-55-339.

The taxpayer first disputed the intent of the Legislature to levy the tax in the first instance but, in the alternative, submitted the objection that if the tax

1. The Attorney General is required to issue rulings upon questions of public concern when requested by a state official or member of the Legislature. Miss. Code 1972, §7-5-25.

2. The Motor Vehicle Comptroller is the collecting agent for taxes upon motor fuels and heating fuels and all objections must be first heard by and a record made before the Comptroller. Miss. Code 1972, §27-55-301, et seq.

3. The Chancery Court hears all appeals from the orders of the Motor Vehicle Comptroller in contested tax matters. Miss. Code 1972, §27-55-339.

was in fact levied, the statute violated federal constitutional prohibitions and mandates, especially the Fifth and Fourteenth Amendments.

(ii) **Judgments and Orders:** The opinion and judgment of the Supreme Court was entered on October 13, 1975 (Apx. G and H). An order overruling petition for rehearing was entered on December 8, 1975 (Apx. I). Notice of appeal was filed on February 17, 1976 in the Supreme Court of Mississippi (Apx. A).

(iii) **Statutory Appeal Jurisdiction:** There was drawn in question the validity of a state statute levying a tax on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity. Jurisdiction is believed to be sustained under 28 U.S.C. §1257(2).

(iv) **Cases Sustaining Jurisdiction:** These include *WHYY, Inc.* v. *Borough of Glassboro*, 393 U.S. 117, 89 S. Ct. 286 (1968).

(v) **State Statutes in Question:** The state statute which levies the disputed tax is Miss. Code 1972, §27-55-313 (Apx. K). Related statutes are Miss. Code 1972, §27-55-303 (Apx. J) and §27-59-11 (Apx. L). Since the statutes are lengthy, quotation at this point is omitted. Copies of the opinions, orders and notice of appeal are appended as above noted.

EXPLANATION OF RECORD

Under Rule 21, petitioner omits filing a complete certified record but expands the Appendix hereto so as to include the relevant papers. Some of the supporting papers refer to "Joe Sharpe, Motor Vehicle Comptroller"; some refer to "Doxey Fisher"; and others to

"Robert G. Sharpe" in the same official capacity. This is due to changes in the office of the Motor Vehicle Comptroller.

Some of the documents contained in the appendix refer to sections of the Mississippi Code of 1942 and others refer to the Code of 1972. A table of parallel references is included in the appendix (Apx. O).

C. QUESTIONS PRESENTED

Consistently with the Commerce Clause and Fifth and Fourteenth Amendments to the Constitution of the United States, may the state single out one petroleum product, diesel fuel or No. 2 oil, heretofore widely used as an industrial heating agent, and impose upon the privilege of its distribution a confiscatory tax (10¢ per gallon or approximately 80% of the normal selling price), when no tax at all is imposed on the distribution of other sharply competitive fuels, notably liquified petroleum gas, widely used for the same purpose, thereby: (1) completely destroying a substantial segment of the business of oil distributors in relation to a significant industrial market, (2) tending to create a monopoly in one product and to destroy competition among producers of heating agents, (3) benefitting no one at all except sellers of competitive fuels; (4) producing no future revenue at all to the taxing state; and (5) eliminating a major source of industrial energy from the marketplace and aggravating the energy crisis.

D. CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment V

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 8

"The Congress shall have Power

. . .

"3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

E. FEDERAL QUESTIONS TIMELY RAISED

Appellant contended below that the disputed tax was not levied under the law but that if mistaken, the tax violated the federal constitution. The stipulation on which the case was tried includes the following (Apx. B):

> "12. The Taxpayer takes the position that the Ten Cents (10¢) tax levied on 'Other Motor Fuels' by Mississippi Code of 1942, §10077-01, et

seq., was not imposed under the law upon diesel fuel where used as a heating agent in the treatment of raw material in manufacturing asphalt for use in paving roads and highways under contract with the Mississippi State Highway Department.

"Also, the Taxpayer takes the position that the levy of tax of Ten Cents (10¢) per gallon on diesel fuel used as a heating agent, to the exclusion of otherwise competitive products such as propane, would be confiscatory and a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and a denial of due process of law as guaranteed by the United States Constitution and by the Constitution of the State of Mississippi, and, therefore, ineffective and void."

The constitutional assertion was repeated in the Supreme Court and that Court responded in the opinion. It was repeated in a petition for rehearing, but rehearing was denied.

F. STATEMENT

Mississippi has a statute which imposes a privilege tax "upon any distributor of other motor fuel for the privilege of engaging in the business of selling or delivering other motor fuel to a retail dealer, user or any other person for use in propelling motor vehicles on the highways of this state and/or for the privilege of engaging in the business of selling and delivering other motor fuel in performing contracts of construction, reconstruction, maintenance or repairs, where such contracts are entered into with the State of Mississippi . . . or any political subdivision thereof. . . ." Miss. Code 1972, §27-55-313[4] (Apx. K).

"Other motor fuel" is defined to mean "all combustible gases and liquids used or usable for the generation of power for propulsion of motor vehicles except that it does not include . . . liquified compressed gas." Miss. Code 1972, §27-55-303[5] (Apx. J).

The state then levies a tax of 10¢ per gallon upon the distributor who acquires other motor fuel for sale or delivery to a retail dealer or user. Dealing with liquified petroleum gas (propane), the tax is eight cents (8¢) per gallon when used to propel motor vehicles, Miss. Code 1972, §27-59-11[6] (Apx. L), but no (zero) tax when used as a heating agent, whether used in performing contracts with the state or otherwise.

As interpreted by the Mississippi Supreme Court, the result of this is that if motor fuel, as defined, is used by a contractor as a heating agent to manufacture materials to be used in public works, the tax is 10¢ per gallon upon the distributor, but if the motor fuel happens to be propane which is used for the same purpose, there is no tax at all.

The statute imposing the tax took effect on January 1, 1970. The first question which arose was whether the tax was actually imposed by the statute. Believing that it was not, petitioner sold diesel oil to its customers for use as a heating fuel and took agreements of indemnification when the collecting agency (Motor Vehicle Comptroller) issued a regulation indicat-

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4. Miss. Code 1942, §10077-07 (same statute).
5. Miss. Code 1942, §10077-02 (same statute).
6. Miss. Code §10079-06 (same statute).

ing that the disputed tax of ten cents per gallon would be enforced.

While the record is silent as to the volume of business involved in the distribution of diesel oil for use as a heating agent by all public contractors as a group, the extent of use is indicated by the fact that for the period January 1, 1970 through March, 1972, a single customer (Mid-State Paving Company) purchased from petitioner alone 1,863,791 gallons on which the tax and penalty amounted to $198,543.26.

According to the stipulation on which the case was tried, diesel oil was the fuel generally used to manufacture asphalt paving material prior to the issuance by the collecting agency of its regulation indicating its interpretation of the statute as imposing a tax which virtually doubled the cost of the fuel. Thereafter, the use of diesel oil was quickly phased out, as asphalt plants were promptly converted over to the use of liquified petroleum gas, a closely competitive fuel, also in general use, and diesel oil was accordingly taxed out of the flow of commerce as an industrial heating fuel in this significant area of use (Stipulation of Facts, Apx. B).

To bring the facts home more specifically to this case, the discrimination is between the sale of diesel fuel (No. 2 oil) and liquified petroleum gas (propane) for use as an industrial heating fuel by a road contractor to produce asphalt paving material to become a component part of pavement on the public highways. Since discrimination is facially obvious, we address the further question of whether the discrimination is arbitrary or otherwise invidious.

In demonstrating this brand of discrimination, we have included in the appendix the stipulation of agreed facts on which this case was heard (Apx. B).

According to the stipulation of facts, the two fuels, diesel oil and propane, are the two principal fuels used as heating agents in manufacturing asphalt paving. Asphalt plants are generally adaptable to the use of either fuel and can readily be changed over from the use of one to the use of the other (Apx. B, par. 3).

Therefore, the two fuels most commonly used have been closely competitive in price in relation to the units of heat obtainable from each fuel and the two fuels have been highly competitive as industrial heating fuels, but as further stipulated (Apx. B):

> "8. Standard Oil Company produces and sells diesel fuel, but does not produce or sell liquified compressed gas (propane). It cannot be competitive, price-wise, for the raw fuel, with propane for use as a heating agent if the disputed tax is added, because of the price factor, as illustrated below." (Apx. B).

Illustrated in the stipulation are these facts (Apx. B, par. 9-10):

> "9. Without adding the disputed tax, but after adding all other taxes assessed and collected on the two heating agents (diesel fuel and propane), the comparative costs to the asphalt producer during the period in question of the optional fuels were:
>
> | | |
> |---|---|
> | Diesel Fuel (per gallon) | 12.390¢ |
> | Propane (per gallon) | 7.943¢ |
>
> "10. Three (3) gallons of diesel fuel is required to dry sand for one ton of asphalt mix to meet State Highway Department specifications. On the other hand, four and eight-tenths (4.8) gallons of propane are required to dry the same amount of

asphalt mix to meet said specifications. Therefore, the comparative costs per ton of mix were:

Diesel Fuel	37.17¢
Propane	38.12¢

"With the disputed tax added to the cost per ton of mix, the comparative costs per ton of production becomes:

Diesel Fuel	65.52¢
Propane	38.12¢
Difference per ton of mix:	27.40¢"

Since propane is not taxed when used as a heating agent (it is only taxed when used in internal combustion engines), the price of that fuel remains unaffected, but the state court has construed the state statutes as imposing upon the distribution of diesel, when used for the very same purpose, a tax of ten cents (10¢) per gallon, or *over 80% of its price* in the marketplace —almost doubling the cost to the industrial user of this fuel.

Obviously, therefore, the tax does three things. It (1) destroys the business of selling diesel oil as a heating fuel and (2) destroys competition in the two principal fuels most commonly in use and (3) produces no benefit to the state once the existence of the tax becomes a known legal fact.

Only the economic facts of life need be cited in order to demonstrate these truths which are self-evident. No one at all could use diesel oil and remain in business when other fuels are available to his competition at half the cost. This disparity withdraws the diesel fuel from the marketplace and, consequently, destroys petitioner's business in favor of the propane distributor who avoids the need to compete. Where is the state interest?

The state gains nothing because if there are no purchases there is no tax to be collected and no one could afford to purchase diesel oil and increase his fuel cost by 80% over the cost of using propane.

These self-evident facts were substantially incorporated into the stipulation of facts as follows:

> "7. Prior to April 15, 1971,[7] some portable asphalt plants were using propane, and some were using Number 2 oil. After April 15, 1971, most plants operating in Mississippi which had been using Number 2 oil, including Mid-State Paving Company, were converted over to the use of propane or lower grade oils as heating agents. The mentioned conversions were made over a period of time measured by the practical problems involved in shutdown time required for making the conversions and the availability of other heating agents." (Apx. B).

G. ARGUMENT

The broad principles surrounding review of state taxing statutes are too well settled for serious debate. What we do seek to debate is the application of those principles to the circumstances of the present case, because there is no precedent which can be considered controlling.

In broad principle, the states, when dealing with their proper domestic concerns and not trenching upon the prerogatives of the national government or violating the guarantee of the Federal Constitution, have the attribute of sovereign powers in devising their fiscal

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7. This is the date on which the collecting agency issued its "regulation" indicating that it would enforce the disputed tax.

systems to insure revenue and foster their local interests, but the taxing power of the states is subject to the requirements of the due process and equal protection of the Fourteenth Amendment, and while that Amendment imposes no ironclad rule of equality, there is nevertheless a point beyond which the states cannot constitutionally go. As put by the Court in *Ohio Oil Co.* v. *Conway*, 281 U.S. 146, 50 S. Ct. 310 (1930):

> ". . . The State may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The State is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 20 S. Ct. 560, 561, 64 L. Ed. 989; Louisville Gas Co. v. Coleman, 277 U.S. 32, 37, 48 S. Ct. 423, 72 L. Ed. 770; Air-Way Corporation v. Day, 266 U.S. 71, 85, 45 S. Ct. 12, 69 L. Ed. 169; Schlesinger v. Wisconsin, 270 U.S. 230, 240, 46 S. Ct. 260, 70 L. Ed. 557, 43 A.L.R. 1224." (50 S. Ct. at 314)

Every local interest does not necessarily qualify as a vehicle to carry the tax statute beyond the reach of the Fourteenth Amendment. Given some legitimate state objective, "The crucial question, however, is whether [the statute] advances that objective in a manner consistent with the command of the Equal Protection Clause." *Reed* v. *Reed*, 404 U.S. 71, 92 S. Ct. 251 (1971).

In any case, moreover, the classification or discrimination, in order to pass the Constitutional test,

must be *reasonable*, *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 79 S. Ct. 437 (1959), or to use the language of Chief Justice Hughes, the classification must proceed upon a "rational basis". *Ohio Oil Co.* v. *Conway*, supra. Or as the Court said in striking down the tax in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389, 48 S. Ct. 553 (1928):

> ". . . In other words, the equality clause requires merely that the classification shall be reasonable. We call that action reasonable, which an informed, intelligent, just-minded, civilized man could rationally favor. In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike, that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state, and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote, or negligible. . . . (See also cases cited in footnote No. 4)." (48 S. Ct. 556).

This brings the discussion to the question (1) whether the disputed tax has any legitimate state objective; (2) whether such objective, if any, is advanced at all or is advanced in a manner consistent with the constitution; (3) whether the classification proceeds reasonably or on a rational basis.

Petitioner's position is that the tax is arbitrary; that it is an invidious discrimination; that it can serve

no legitimate state interest; that it is confiscatory and destructive of petitioner's business; that it is even without demonstrable benefit to the state as a revenue producing measure or otherwise; that it destroys competition between products otherwise competitive and that, overall, it is devoid of any "rational basis" whatever and is therefore an invidious discrimination of constitutional proportions and, finally, that the case is unique in that there is a national interest to be considered and protected, because the withdrawal of the heating fuel from the flow of commerce has a significant impact upon the nationwide energy crisis.

In postulating these things, we are not unmindful that the state court's opinion assumed the existence of a state objective and a difference in the composition of the competing petroleum products and that the state court used all of the correct phrases taken from the various opinions by this Court. But saying it does not necessarily make it so.

In *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 74 S. Ct. 403 (1954), the Court reannounced its long-standing rule that it would decide for itself facts or constructions upon which constitutional issues rest. In this tax case the Court said:

> ". . . Such a conclusion as to the meaning of the quoted words would deny the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest. . . ." (74 S. Ct. at 410).

Also, in *American Oil Company* v. *Neill*, 380 U.S. 451, 85 S. Ct. 1130 (1965), the Court said:

> "When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form. Wisconsin v. J. C. Penney Co., 311 US 435, 443-444, 85 L ed 267, 270, 61 S Ct 246, 130 ALR 1229; Lawrence v. State Tax Comm'n, 286 US 276, 280, 76 L ed 1102, 1105, 52 S Ct 556, 87 ALR 374, and cases cited therein. This approach requires us to determine the ultimate effect of the law as applied and enforced by a state or, in other words, to find the operating incidence of the tax. Connecticut Gen. Life Ins. Co. v. Johnson, 303 US 77, 80, 82 L ed 673, 677, 58 S Ct 436." (85 S. Ct. at 1133).

With the Court's indulgence, the absence of that "rational basis" which is essential to the legality of the statutory discrimination can be easily demonstrated, viewing "substance rather than form" and considering the effect of the "practical operation of the tax".

Ironically, the Mississippi Court heretofore has invalidated various tax statutes on the basis of arbitrary discrimination very similar to that involved here.

Holding that a classification is not valid if it is arbitrary or without substantial basis, the Court in *Adams, State Revenue Agent* v. *Standard Oil Co. of Kentucky*, 97 Miss. 879, 53 So. 692 (1910), held that the exemption of confederate soldiers from the payment of a privilege tax on peddlers was in violation of the Fourteenth Amendment, because the classification was unreasonable in taxing one class of sellers (oil companies) and exempting another.

Rodge v. *Kelly, Tax Collector,* 88 Miss. 209, 40 So. 552 (1906), involved a privilege tax on the business of money lending on the security of a mortgage of personal property but imposing no such tax on the business of lending money on other types of securities. It was held that the classification was not permissible under the Fourteenth Amendment.

Citing the above and numerous other authorities, the Mississippi Court held in *Riley, State Auditor* v. *Ayer & Lord Tie Co.,* 147 Miss. 105, 113 So. 214 (1927), that a confiscatory tax upon the business of producing and selling lumber treated by creosoting plants when no such prohibitory tax was imposed upon like businesses and industries was void as a violation of the Fourteenth Amendment.

In the cited case, the Legislature imposed a tax of twenty-five cents (25¢) per thousand on each thousand feet of lumber treated by creosoting plants. The taxpayer, a creosoting plant, sought an injunction against collection, assigning as grounds:

> ". . . that it is contrary to the due process and equal protection clauses of the Fourteenth Amendment to the federal Constitution; that the tax imposed by the last act is prohibitive, and is also discriminatory in that no such prohibitive tax is imposed upon like businesses and industries; and that the tax imposed is so great that the business will not survive it, because the products of the plant cannot be sold upon the market in competition with other like businesses which are not subject to such a prohibitive tax." (113 So. at 215).

The Court concluded as follows:

> "We have reached the conclusion that the privilege tax imposed by chapter 118, Laws of 1926, is unconstitutional and void, because it violates the Fourteenth Amendment to the federal Constitution, in that it denies equal protection of the law in imposing a prohibitive tax for carrying on the business of creosoting timber, whereas other businesses of like kind are not thus assessed with a prohibitive tax. To put it in different words, the particular business here in question is destroyed by the prohibitive tax imposed, when like businesses are not destructively taxed; consequently, the imposition of the tax is discriminatory and denies equal protection of the law." (113 So. at 215).

Numerous cases are cited by the Court in support of the quoted conclusion.

Beyond question, the business of the taxpayer in the case at bar of selling diesel fuel as a heating agent would be destroyed by the imposition of an excise tax which would practically double the cost to the customer in relation to competitive fuels in common use for the identical purpose.

The state court would distinguish the *Riley* case on the ground that there was involved in that case the destruction of an entire business, whereas in the case at bar the tax would destroy only one division of the business of Standard Oil Company. But it is difficult to follow the reasoning here, because the business of distributing diesel fuel for use as an industrial heating agent is quite substantial, and the discrimination is equally destructive of a lawful business and equally discriminatory on its face and equally, therefore, without justification by constitutional standards.

The principal case relied upon by the Comptroller and finally by the court below is *Heisler* v. *Thomas Colliery Co.,* 260 U.S. 245, 43 S. Ct. 83 (1922), but reliance on this case is, we submit, misplaced.

In the cited case, it appeared that the State of Pennsylvania imposed a tax of 2-1/2 percent upon anthracite coal when prepared for market but no such tax was levied on the handling of bituminous coal. It was asserted that since the two coals were fuels, it was necessary to disregard all else and tax them alike. This Court disagreed and held that a general scheme of taxation where one type of coal was taxed and another untaxed was not invalid merely because the two were usable as fuel and were competitive in some areas, since the products were inherently dissimilar.

The case is distinguishable, however, on at least two points. *First*, the tax on anthracite coal was only 2-1/2% and therefore unequal but also non-destructive of the business of selling the product for use as fuel. *Second*, there were other local considerations peculiar to the State of Pennsylvania where the two products were mined in vast quantities.

On the other hand, the tax on the privilege of selling diesel fuel as a heating agent is not a mere 2-1/2% but is 80% and the effect is not just to create *some* inequality; but is to destroy utterly the business and therefore amount to confiscation.

There is, we submit, a vast difference. For example, the Mississippi tax on distributors of propane[8] when the fuel is used as a motor fuel is 8¢ per gallon versus 10¢ per gallon for diesel fuel[9] versus 8¢ per gallon on gasoline.[10] There may well be differences to justify these variations in rates and on this score there

8. §27-59-11.

9. §27-59-313.

10. §27-55-11, Miss. Code of 1972.

is no complaint, just as a 2-1/2% tax on anthracite coal might be justified on like differences even if bituminous coal remains free of tax. But suppose the coal tax had doubled the price and put the producer out of a significant area of business,—thereby destroying all competition in that area and destroying itself in the process for lack of a user or taxpayer from whom the tax could be exacted.

The Constitution does not require exact equality under any ironclad formula, hence, the taxing power has substantial play in the joints, but this is not to say that the lack of equality can rise to the point of confiscation and self-destruction without running afoul of the Fourteenth Amendment.

The judicial concern apparent throughout the precedents is to allow a pragmatic tolerance of the states' essential function in devising their fiscal systems to insure tax revenue on which to operate the government. But the measure in question simply has no relation to the collection of revenue, because no one can economically afford to use the product with the tax added. Therefore, the tax is not a revenue measure at all and is completely foreign to the state's fiscal system and serves no purpose whatever except to destroy one lawful business and tend to create a monopoly in another business (selling propane) which pays no tax and contributes nothing to the tax-gathering process.

In this unique context, there is no precedent in support of the constitutionality of the measure, and we urge the Court to correct the arbitrary and destructive discrimination so palpable in this case and thereby restore diesel fuel to the flow of commerce and to the field of competition.

The state court sought to justify the tax on two theories. One is expressed in the comment by that court that, "The record shows that the state interest behind the tax is the prevention of 'double dipping.' " In other words, the speculation is that a road contractor might bid a job with the tax added and then avoid paying the tax in some undisclosed manner, thereby "double dipping". There are two very practical and self-evident reasons why such tenuous assumptions cannot justify the rank discrimination involved here. *First,* the contractor would rarely, if ever, be low bidder if he bid his fuel cost at double the market price of comparable fuels in common use. *Second,* it would be just as easy to "double dip" by doubling the anticipated price of propane in the bid calculation as by doubling the anticipated price of diesel oil. The confiscatory tax on diesel oil, therefore, prevents nothing whatever as suggested by the state court. It only serves to prevent the use of diesel oil altogether and for no reason under the sun which can reasonably be considered as serving a legitimate state interest.

The final attempt of the state court to justify the discrimination is on the notion that there are "inherent differences" between propane and diesel fuel as evidenced by this comment:

> "Finally, apart from the pronounced state interest in ending 'double dipping,' a more basic reason may be relied upon to sustain the discrimination between propane and diesel, specifically the inherent differences between propane and diesel fuel. These differences were testified to by a witness for the Comptroller and form in and of themselves a sufficient basis for the tax classification. Heisler, *supra,* 260 U.S. at 257, 43 S. Ct. at 85, 67 L.Ed. at 242; Allied Stores of Ohio, Inc., *supra,* 358 U.S. at 528, 79 S. Ct. at 441, 3 L.Ed. 2d at 486.
>
> "We, therefore, reverse the decree of the chancery court and reinstate the order of the Motor Vehicle Comptroller." (322 So.2d at 461).

It is respectfully submitted that the "inherent differences" argument will not stand the test of reason.

True, the two fuels are not the same, but they are used for exactly the same purpose and the difference finds no logical relevance as a permissible discrimination in the area in question. This is so because the discrimination does not attach itself to the use of the fuel in general but only to its use by contractors performing work for the state and its political subdivisions. When used as a heating agent by non-contractors, there is no tax. This even includes use by a third-party manufacturer when the material is sold to a contractor for use in such contracts. When used by the State itself, there is no tax. When used by contractors other than on work for the State and its political subdivisions, there is no tax. If the objective of the tax was to discourage use of diesel oil as a heating agent or encourage the production and use of liquified petroleum gas as a heating agent, because of an "inherent difference" between the two, the discrimination would follow the use in general and without restriction to one particular use by one particular class of users.

The "witness for the Comptroller", to whom the Court referred, was one Everhard Baker, Jr., Assistant State Chemist, whose testimony is reproduced in full in the appendix (Apx. M). To summarize, with parenthetical comments indicating irrelevancy to constitutional issues, this witness testified that:

1. Propane is derived from the processing of wet natural gas and diesel fuel (No. 2 oil) comes from distilling crude oil. Therefore, the method of production is different. (But the tax is not levied on the production business.)

2. In the handling, propane is kept under pressure and diesel requires no pressure. Therefore, the equipment for handling the two is not identical. (But the tax is not levied on the equipment.)

3. In years gone by, wet natural gas was burned in the field and wasted. (But now it is collected and processed and needs no favorable tax discrimination to bring it to market.)

4. LP gas burns cleaner than diesel, just as diesel is cleaner burning than lower grade oils. (But the witness said that he was not testifying on an ecological basis and there is no evidence that the State acted on any such basis, and the lower grade untaxed oils burns even less clean.)

5. No distinctions could be made in relation to the practical use of the two fuels as heating agents in asphalt plants. (Since the two fuels were the ones in most common use, the presumption is that they were comparable both in usefulness and price before the tax is added to the diesel alone.)

Of course, no two products are exactly alike. Fuels useable for industrial heat include natural gas, liquified petroleum gas (propane), diesel fuel (or No. 2 oil) and lower grade oils, which derive from the "bottom product" of the distilling process. But all are burned to produce required heat and all serve the same purpose and have the same result. Without rank discrimination in taxes, these fuels, when used as heating agents in

asphalt plants, are competitive on the open market and are equally useful.

Is a destructive discrimination made permissible merely because one fuel is derived from wet natural gas and the other from crude oil or because the one is handled under pressure and the others are not or because one burns cleaner than another? Does the fact that one was wasted in years long past form any basis for a present destructive tax discrimination?

The Mississippi Court says "yes" and that this is the "more basic reason" to "sustain the discrimination between propane and diesel."

However, certain facts are inescapable. The fact remains that both fuels are useful competitive products and the use of either is equally lawful and each makes a major contribution to industrial heating fuel requirements, just as do other agents such as natural gas and lower grade oils, none of which are taxed at all. Only diesel oil is taxed out of permissible use as a heating agent.

Also, the fact remains that apart from taxes, the distributors of propane receive no more and no less of the benefits of the state government than distributors of diesel oil. Except for taxes, both are treated exactly alike, being neither encouraged nor discouraged in relation to comparable business or in relation to each other. Yet the tax statutes single out diesel for an 80% of value levy, and allow its competitors to go untaxed.

H. SUMMARY OF ARGUMENT

The approach to this case has been with a full awareness of the difficulty of attacking tax statutes which represent the attempt of the states to gather

revenue, but there is also present in the instant case a convergence of four factors which, in combination, make the case unique and serve to set it apart from other tax cases heretofore considered by this Court under constitutional challenge. These, in summary, are:

First, since the tax virtually doubles the cost of the fuel to the industrial user, while closely competitive fuels, notably propane, go untaxed, the business of distributing No. 2 oil for use as a heating agent is totally destroyed.

Second, the discrimination has no logical nexus with serving any ascertainable state interest.

Third, since the tax is self-destructive in the sense that it cannot, in point of fact, produce revenue, because no one can afford to use diesel fuel at double the price of other fuels, it is not a true revenue measure at all.

Fourth, whether intended or accidental, the sole effect is not to produce revenue but is to regulate or prohibit commerce in the distribution and use of diesel oil for a specified industrial use under the cloak of a revenue measure which can produce no revenue.

Even the taxing power of Congress has its constitutional limits, as this Court has repeatedly held.

> "That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment is settled." *Heiner* v. *Donnan,* 285 U.S. 312, 52 S. Ct. 358 (1932).

> "This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment." *Nichols* v. *Coolidge,* 274 U.S. 531, 47 S. Ct. 710 (1927).

To qualify a destructive tax for constitutional survival, it must at least be one levied for or bear some significant relation to the revenue. In *Bailey* v. *Drexel Furniture Co.,* 259 U.S. 20, 42 S. Ct. 449 (1922), the Court held that a federal tax which served to regulate child labor, a function reserved to the states, and served no significant revenue gathering purpose was unconstitutional. The Court said:

> ". . . Taxes are occasionally imposed in the discretion of the Legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us. . . ." (42 S. Ct. 451).

The present tax produces no revenue and does nothing but interfere with the flow of commerce and destroy a lawful business and tends to create a monopoly and has no place in the fiscal affairs of the state.

Otherwise described, the tax is confiscatory, discriminatory and useless as a revenue measure, to which may be added the fact that it disrupts the free choice of energy sources in the marketplace and adds significantly to the energy crisis and usurps the function of Congress in the regulation of commerce.

By way of expanding upon the above points in the context of the circumstances of this cause, the following

facts are established by stipulation or are uncontradicted.

Standard Oil Company is a distributor of diesel fuel (No. 2 oil) but not of propane. The untaxed price was 12.39¢ per gallon. The tax statute levies another 10¢ per gallon, or over 80% of its value. With the tax added, distributors of diesel fuel cannot compete with distributors of propane, which remains untaxed. The effect is simply to withdraw diesel fuel from use as a heating fuel in the significant area involved. This means, of course, that once the tax is known to have been enacted, it becomes self-destructive and could not be viewed as a revenue measure in practice, because no one could afford to use it.

Whether intentional or accidental, the result is simply this. The measure serves to regulate, or indeed prohibit, commerce in the sale and distribution of diesel fuel for the generation of industrial energy, without any prospect of producing tax revenue to the state. As a measure having no significant tax gathering effect, it becomes an infringement upon the exclusive power of Congress to regulate interstate commerce as found in Article I(3) of the Constitution of the United States.

The attempt at "classification" as between diesel oil and propane or other heating fuels becomes pure discrimination without logical reason in purpose or effect in relation to the tax gathering function of the state and finds no nexus with any recognizable state interest. In short, it is an ill wind that blows no public good and serves no public interest.

CONCLUSION

While broad principles for testing the constitutionality of state taxing statutes are well settled in the abstract, the point beyond which the state may not go in its discrimination can be defined only by the accumulation of precedents dealing with specific situations. Appellant seeks again to test the constitutional location of that point in the context of a confiscatory tax which completely destroys a significant segment of Appellant's business, that of selling diesel oil, in favor of an untaxed highly competitive product, without any basis which reasonably can be found to serve a substantial or legitimate state interest, and appellant solicits the attention of this Court against the backdrop of a national interest tied to the current energy crisis, to which the disputed tax would add its part by withdrawing the optional use of this fuel and its flow in the stream of commerce when other fuels may be in short supply.

Respectfully submitted,

THOMAS H. WATKINS
Post Office Box 650
Jackson, Mississippi 39205

VARDAMAN S. DUNN
Post Office Box 1046
Jackson, Mississippi 39205

Attorneys for Petitioner

Of Counsel:

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Post Office Box 650
Jackson, Mississippi 39205

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Post Office Box 1046
Jackson, Mississippi 39205

APPENDIX TO JURISDICTIONAL STATEMENT

[APPENDIX A]

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

NO. 48,314

ROBERT G. SHARPE, MOTOR VEHICLE COMPTROLLER, STATE OF MISSISSIPPI
APPELLANT

vs.

STANDARD OIL COMPANY
APPELLEE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed February 17, 1976)

Appellee, Standard Oil Company, hereby gives and files notice of appeal from the final judgment of this Court to the Supreme Court of the United States, and in support hereof specifies the following:

1. The party taking the appeal is Standard Oil Company.

2. The judgment appealed from is the judgment of this Court entered pursuant to its opinion and decision filed October 13, 1975, and from the judgment of this Court denying the petition of Standard Oil Company for rehearing entered on the 8th day of December, 1975.

3. The appeal in this cause drew in question the validity of Section 27-55-313, Mississippi Code of 1942, and related sections on the ground of repugnancy to the Constitution of the United States, and the decision of this Court was in favor of the validity thereof.

4. This notice is given and an appeal is taken under 28 U.S.C. 1257(2) and related sections and is filed within the 90 days allowed by 28 U.S.C. 2101.

Respectfully submitted,

The Standard Oil Company

By: /s/ Thomas H. Watkins

By: /s/ Vardaman S. Dunn
Attorneys of Record for Standard Oil Company

Of Counsel:

Watkins & Eager
Post Office Box 650
Jackson, Mississippi 39205

Cox & Dunn, Ltd.
Post Office Box 1046
Jackson, Mississippi 39205

CERTIFICATE OF SERVICE

I, the undersigned, one of the attorneys of record for Standard Oil Company, certify that I have this day served a true copy of the above and foregoing Notice of Appeal upon John B. Clark, Post Office Box 1084, Jackson, Mississippi 39205, attorney of record for appellant.

THIS the 16th day of February, 1976.

/s/ Vardaman S. Dunn
Attorney for Standard Oil Company

[APPENDIX B]

BEFORE THE MOTOR VEHICLE COMPTROLLER
OF THE STATE OF MISSISSIPPI

IN THE MATTER OF THE ASSESSMENT AND DEMAND OF THE MOTOR VEHICLE COMPTROLLER DEMANDING PAYMENT FROM STANDARD OIL COMPANY OF THE SUM OF $198,543.26 IN TAXES BASED ON SALES OF NO. 2 HEATING FUEL TO MID-STATE PAVING COMPANY

STIPULATION OF FACTS

1. This is a proceeding under Mississippi Code of 1942, §10077-20, before the Motor Vehicle Comptroller, in relation to an assessment and demand for the payment of taxes under Mississippi Code of 1942, §10077-01, et seq., being Title 40, Chapter 1, Article 7, styled "Other Motor Fuels". The fuel sought to be taxed and now in dispute was sold by Standard Oil Company and was purchased by Mid-State Paving Company, a company engaged in the business of asphalt paving. The disputed tax has not been collected by Standard Oil Company, or paid by Mid-State Paving Company.

This stipulation, when approved by Standard Oil Company and the Motor Vehicle Comptroller, shall constitute a part of the record made at the hearing before the Comptroller.

2. Mid-State is a Mississippi Corporation, primarily engaged in asphalt paving work, including work on highways owned by the State of Mississippi or its political subdivisions. Asphalt used in paving highways is produced by the mixing and processing of various materials by asphalt plants, usually set up and located off the right-of-way near the highway projects. One of the ingredients of the asphalt mix is sand, which must be dried by the application of heat to extract the moisture. This drying process is accomplished by burning fuel. The fuel generally used is either No. 2 oil, which is the same as diesel fuel, and falls within the definition of "other motor fuel" as defined in Section 10077-02 (d), or liquified compressed gas, known as propane. Other fuels sometimes used are other grades of heating oil and natural gas. Asphalt plants may be adapted to the use of any of such fuels and changed over from one to the other, except that the plants of Mid-State are portable and therefore were not adapted to the use of natural gas. Diesel fuel and propane are two principal fuels used in the treatment of the raw material in manufacturing asphalt mix by portable plants for paving highways under contracts with the Mississippi State Highway Commission.

3. Mid-State Paving Company is not engaged in the business of manufacturing asphalt for sale to the public, and although Mid-State manufactures asphalt for its own use in private contracts, the tax involved in this suit is for diesel used in manufacturing asphalt used by Mid-State in fulfilling its contracts with the

State of Mississippi or its political subdivisions in the construction, reconstruction, or repair of highways and streets.

4. On or about December 12, 1966, Mid-State Paving Company filed an application with the Motor Vehicle Comptroller for the issuance of a "Nonhighway Diesel Fuel or Kerosene Users Permit," and a copy of the application is attached as Exhibit "A". A certificate book was issued as a matter of course. On or about July 2, 1970, Mid-State filed a supplemental listing, a copy of which is attached as Exhibit "B". Under date of July 1, 1970, the Motor Vehicle Comptroller issued to Mid-State Paving Company Permit No. DDK 38-0350, a copy of which is attached as Exhibit "C".

5. A total of 1,863,791 gallons of diesel fuel was sold by the Taxpayer to Mid-State Paving Company from January 1, 1970, through March, 1972, and allegedly used by it in its asphalt plants for the stated purpose. The asphalt plants of Mid-State Paving Company were utilized to produce asphalt to carry out its own contracts with the Mississippi State Highway Department, said contracts having in each instance been advertised and awarded to Mid-State Paving Company as low bidder. If any tax is owed, tax on the above amount of fuel is $167,741.19 after credit is given for the one cent tax levied under Section 10078-107, which has been paid, and the penalty is $30,802.07, for a total of $198,543.26.

6. In response to a request for an opinion, the Attorney General of the State of Mississippi made a ruling, a copy of which is attached to this stipulation as Exhibit "D". Subsequent to the ruling of the Attorney General, the Comptroller, on April 6, 1971, is-

sued his "Regulation No. 4-B", a copy of which is attached to this stipulation as Exhibit "E".

7. Prior to April 15, 1971, some portable asphalt plants were using propane, and some were using Number 2 oil. After April 15, 1971, most plants operating in Mississippi which had been using Number 2 oil, including Mid-State Paving Company, were converted over to the use of propane or lower grade oils as heating agents. The mentioned conversions were made over a period of time measured by the practical problems involved in shutdown time required for making the conversions and the availability of other heating agents.

8. Standard Oil Company produces and sells diesel fuel, but does not produce or sell liquified compressed gas (propane). It cannot be competitive, price-wise, for the raw fuel, with propane for use as a heating agent if the disputed tax is added, because of the price factor, as illustrated below.

9. Without adding the disputed tax, but after adding all other taxes assessed and collected on the two heating agents (diesel fuel and propane), the comparative costs to the asphalt producer during the period in question of the optional fuels were:

Diesel Fuel (per gallon)	12.390¢
Propane (per gallon)	7.943¢

10. Three (3) gallons of diesel fuel is required to dry sand for one ton of asphalt mix to meet State Highway Department specifications. On the other hand, four and eight-tenths (4.8) gallons of propane are required to dry the same amount of asphalt mix to meet said specifications. Therefore, the comparative costs per ton of mix were:

Diesel Fuel	37.17¢
Propane	38.12¢

With the disputed tax added to the cost per ton of mix, the comparative costs per ton of production becomes:

Diesel Fuel	65.52¢
Propane	38.12¢
Difference per ton of mix:	27.40¢

11. The Attorney General of the State of Mississippi has issued a ruling as to the disputed tax, as shown by a copy of his opinion attached to this stipulation as Exhibit "F".

12. The Taxpayer takes the position that the Ten Cents (10¢) tax levied on "Other Motor Fuels" by Mississippi Code of 1942, §10077-01, et seq., was not imposed under the law upon diesel fuel where used as a heating agent in the treatment of raw material in manufacturing asphalt for use in paving roads and highways under contract with the Mississippi State Highway Department.

Also, the Taxpayer takes the position that the levy of tax of Ten Cents (10¢) per gallon on diesel fuel used as a heating agent, to the exclusion of otherwise competitive products such as propane, would be confiscatory and a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and a denial of due process of law as guaranteed by the United States Constitution and by the Constitution of the State of Mississippi, and, therefore, ineffective and void.

The Comptroller, on the contrary, takes the position that the tax was levied by the statute and that the statute was not ineffective or void in this respect by reason of the United States Constitution or otherwise, and the Comptroller disagrees with and declines

to acquiesce in the opinion of the Attorney General, Exhibit "F" hereto.

13. The parties reserve the right to offer such additional evidence at the hearing as they or either of them, deem proper.

STIPULATED AND AGREED, this the 6 day of July, 1973.

Doxey Fisher, Motor Vehicle Comptroller of the State of Mississippi

By: Daniel, Coker, Horton, Bell and Dukes, Their Attorneys

By: /s/ Curtis E. Coker

By: /s/ John B. Clark

Standard Oil Company

By: Watkins and Eager and Cox and Dunn, Its Attorneys

By: /s/ Thos. H. Watkins

By: /s/ Vardaman S. Dunn

[APPENDIX C]

I, Joe Sharp, Motor Vehicle Comptroller, State of Mississippi, by virtue of the authority vested in me under Section 10078-137, Mississippi Code of 1942, as Amended, do hereby promulgate the following rules and regulations pertaining to exemption of the tax levied on Oil when used as a "processing agent" in the treatment of raw materials.

REGULATION NO. 4-B

House Bill No. 59

Extraordinary Session of the 1969
Mississippi Legislature

OIL

In accordance with a recent opinion by the Attorney General of the State of Mississippi, diesel fuel and kerosene which is used in extracting moisture from sand to be mixed with asphalt will be considered as a "processing agent" under the provisions of Section 10078-113 (g), Mississippi Code of 1942, as Amended, and is, therefore, exempt from the One Cent (1¢) per gallon tax levied in Section 10078-107, Mississippi Code of 1942, as Amended.

Provided however, that nothing in this Regulation shall relieve any person or persons from the Ten Cents (10¢) per gallon tax levied in Section 10077-07, Mississippi Code of 1942, as Amended, on diesel fuel and kerosene used to extract moisture from sand to be mixed with asphalt, when such asphalt is to be used in the performance of a contract with the State of Mississippi or any political sub-division thereof, when such asphalt is produced by a person or persons holding such contracts with the State of Mississippi or any political sub-division thereof.

This Regulation shall be effective from and after April 15, 1971.

Signed this 6th day of April, 1971.

/s/ Joe Sharp
Motor Vehicle Comptroller

[APPENDIX D]

Department of Justice
OFFICE OF THE ATTORNEY GENERAL
Jackson, Mississippi 39205

A. F. Summer, Attorney General
Martin R. McLendon, Assistant Attorney General

January 16, 1973

Honorable John R. Junkin
Speaker
Mississippi House of Representatives
New Capitol Building
Jackson, Mississippi

Dear Mr. Junkin:

This is in reply to yours of January 10, 1973, as follows:

> "It has come to my attention that the former Motor Vehicle Comptroller promulgated a regulation to the effect that diesel fuel and kerosene used in a certain manner was liable for the ten cents (10¢) per gallon tax levied by Section 10077.07, Mississippi Code of 1942, Recompiled. A copy of Regulation No. 4-B, adopted on April 6, 1971, and effective on and after April 15, 1971, is attached hereto for your clearer appraisal of the question.
>
> "Please advise me whether the regulation is within the authority of the Motor Vehicle Comptroller to adopt, and whether or not, in your opinion, the use of diesel fuel and Kerosene in the manner described in the regulation subjects the distributor to the ten cents (10¢) per gallon tax."

You will note that the Regulation refers to an opinion of this office that when diesel fuel and kerosene

are used as a processing agent the distributor is not liable for the one cent (1¢) per gallon tax levied by Section 10078-107, Mississippi Code of 1942, Recompiled. The second paragraph of the Regulation negates the effect of the Regulation on liability of the distributors for the ten cents (10¢) per gallon tax levied in Section 10077-07 on the use of diesel fuel and kerosene used to extract the moisture from sand to be mixed with asphalt when such asphalt is to be used in the performance of a contract with the State of Mississippi or any political subdivision.

The second paragraph of the Regulation presupposes liability of the tax under such circumstances and, of course, the Regulation does not impose such tax.

The tax levied by Section 10077-07, supra, controlling on this question, provides as follows:

> "A tax at the rate of Ten Cents (10¢) per gallon is hereby levied upon any distributor of other motor fuel for the privilege of engaging in the business of selling or delivering other motor fuel to a retail dealer, user, or any other person for use in propelling motor vehicles on the highways of this State *and/or for the privilege of engaging in the business of selling and delivering other motor fuel in performing contracts for construction, reconstruction, maintenance or repairs, where such contracts are entered into with the State of Mississippi, any political subdivision of the State of Mississippi, or any department, agency, or institution of the State of Mississippi or any political subdivision thereof, if the first notice of publication to bidders on such contract has been given after September 1, 1966.*"
> (Emphasis added)

Section 10077-02, Mississippi Code of 1942, Recompiled, defines the term "use" as follows:

> "(e) 'Use' means, in addition to its ordinary meaning, the receipt of other motor fuel by any person into the fuel supply tank of a motor vehicle or into a receptacle from which other motor fuel is supplied by any person for his own or other motor vehicles."

The definition of "use" is controlling upon the question presented for the reason that the tax is levied upon purchases and the uses.

Use of diesel fuel and kerosene as a "processing agent" was held to be exempt from the one cent (1¢) tax as noted in the Regulation, and it does not seem likely that the Legislature imposed a tax ten times greater upon the same commodity used for the same purpose solely by reason of the fact that the fuel was used as a "processing agent" in the performance of a contract with the State.

In *Mississippi State Tax Commission* v. *Hogg*, 124 So.2d 300 (1960), the Supreme Court said:

> "It is well established by numerous prior decisions of this Court that revenue laws ought to be strictly construed against the taxing power and that all doubts shall be resolved in favor of the taxpayer. Stone v. Rogers, 186 Miss. 53, 189 So. 810; Pan-American Petroleum Corp. v. Miller, 154 Miss. 565, 122 So. 393; Stone v. General Box Company, 212 Miss. 60, 53 So.2d 85."

It is, therefore, the opinion of this office that diesel fuel and kerosene used as a "processing agent" for drying sand to be mixed with asphalt when such asphalt is to be used in the performance of contracts with the State of Mississippi, or any political subdivision thereof, is not liable for the tax imposed by Section 10077-07, supra, even when such asphalt is produced by a person, or persons, holding such contracts with the State of Mississippi, or any political subdivision thereof.

In view of the fact that Regulation No. 4-B, about which you inquire, presupposes such liability, it is not necessary that such Regulation be held invalid. The Regulation was based upon a false premise of liability.

With best wishes and personal regards to you, I am

Sincerely yours,

A. F. Summer, Attorney General
By: /s/ Martin R. McLendon
Martin R. McLendon
Assistant Attorney General

MRMcL/hs

[APPENDIX E]

BEFORE THE MOTOR VEHICLE COMPTROLLER
OF THE STATE OF MISSISSIPPI

IN THE MATTER OF THE ASSESSMENT AND DEMAND OF THE MOTOR VEHICLE COMPTROLLER DEMANDING PAYMENT FROM STANDARD OIL COMPANY OF THE SUM OF $198,543.26 IN TAXES BASED ON SALES OF NO. 2 HEATING FUEL TO MID-STATE PAVING COMPANY

APPEARING FOR STANDARD OIL COMPANY:

Honorable Thomas H. Watkins, Firm of Watkins & Eager, Attorneys at Law, Jackson, Mississippi and Vardaman S. Dunn, Firm of Cox and Dunn, Attorneys at Law, Jackson, Mississippi.

APPEARING FOR DOXEY FISHER, MOTOR VEHICLE COMPTROLLER OF THE STATE OF MISSISSIPPI:

Honorable Curtis E. Coker and Honorable John B. Clark, Firm of Daniel, Coker, Horton, Bell and Dukes, Attorneys as Law, Jackson, Mississippi.

ORDER OF THE MOTOR VEHICLE COMPTROLLER

FINDINGS OF FACT

Having considered all of the evidence in this cause, including the stipulation, testimony, and exhibits, and based on substantial evidence, I make the following findings of fact:

1. Mid-State Paving Company is a Mississippi Corporation, primarily engaged in asphalt paving work, including work on highways owned by the State of Mississippi or its political subdivisions. Asphalt used by Mid-State in paving highways is produced by the mixing and processing of various materials by portable asphalt plants, usually set up and located off the right-of-way near the highway projects or other paving projects the company was performing. One of the ingredients of the asphalt mix is sand, which must be dried by the application of heat to extract the moisture. This drying process is accomplished by burning fuel. The fuel generally used is either No. 2 oil, which is the same as diesel fuel, and falls within the definition of "other motor fuel" as defined in Section 10077-02 (d), or liquified compressed gas, known as propane. Other fuels sometimes used are other grades of heating oil and natural gas. Asphalt plants may be adapted to the use of any of such fuels and changed over from one to the other.

2. Mid-State Paving Company is not engaged in the business of manufacturing asphalt for sale to the public, and although Mid-State manufactures asphalt for its own use in private contracts, the tax involved in this suit is for diesel fuel used by Mid-State in fulfilling its contracts with the State of Mississippi or its political subdivisions in the construction, reconstruction, maintenance or repair of highways and streets, and allegedly used in manufacturing asphalt for that purpose.

3. On or about December 12, 1966, Mid-State Paving Company filed an application with the Motor Vehicle Comptroller for the issuance of a "Nonhighway Diesel Fuel or Kerosene Users Permit." A certificate book was issued as a matter of course. On or about July 2, 1970, Mid-State filed a supplementary

listing of equipment to use tax-exempt fuel. Under date of July 1, 1970, the Motor Vehicle Comptroller issued to Mid-State Paving Company Permit No. DDK 38-0350. The office of the comptroller examines original applications closely, and did so in this case. The original application in this case showed that the use of exempt fuel would be for shop heaters only. A revenue examiner was dispatched, who verified that the use was as indicated and was not in the performance of contracts with the state, or a county or political subdivision, with the possible exception of a small amount of kerosene to be used in safety flares, which was de minimis. On the occasion of such inspection, Mid-State was instructed that tax-exempt fuel could not be used in the performance of a contract with the state, or a county or political subdivision. The "supplementary listing," received July 2, 1970, was, in conformance with the policy of the office of the comptroller, only examined on its face, and was taken at face value. Said supplementary listing does not indicate upon its face, and did not give any notice to the comptroller's office that Mid-State intended to use tax-exempt fuel in the performance of contracts with the state, or a county or political subdivision. The examiner who received and approved the supplementary listing was not familiar with and could not identify the equipment listed. However, even had he been able to do so, such listing would have been no notice of an intended illegal use of tax-exempt fuel, because Mid-State was a qualified dual user of both tax-paid and tax-exempt fuel, and was entitled to use tax-exempt fuel on private contracts, in which it did engage.

4. A total of 1,863,791 gallons of diesel fuel was sold by the taxpayer to Mid-State Paving Company from January 1, 1970, through March, 1972, and allegedly used by it in its asphalt plants for the stated purpose. The asphalt plants at Mid-State Paving Company were utilized to produce asphalt to carry out its own contracts with the Mississippi State Highway Department, said contracts having in each instance been advertised and awarded to Mid-State Paving Company as low bidder, and also to carry out some private contracts. Although Mid-State contended at the hearing that fuel that it contended to be tax-exempt was invariably segregated in properly marked tanks, the proof showed that these practices were not always followed, and the number and character of violations was such that if Mid-State were allowed to receive exempt fuel, allegedly while simultaneously receiving tax-paid fuel for other uses on the same contracts, for certain uses on public contracts, it would be impossible for the comptroller to police and monitor such uses, or to enforce the petroleum products tax laws.

5. Standard Oil Company produces and sells diesel fuel, but does not produce or sell liquified compressed gas (propane). In the normal manufacturing process, Standard Oil produces lower grade heating oils than No. 2 oil, but chooses to "crack" or further refine such oils in order to market the petroleum in other forms.

6. Diesel fuel, or No. 2 oil, is a substantially and materially different fuel from liquified compressed gas, both in chemical composition and in usage. Because of its molecular structure, No. 2 oil is necessarily a "dirtier burning" fuel than liquified compressed gas. Liquified compressed gas has many specialized uses which No. 2 oil does not have. Liquified compressed gas was frequently wasted by "flaring" in the past, for lack of a ready market for the product, but has in recent years come into wider usage, both for use in homes, agriculture, and in this case, commercially.

7. It has been the consistent interpretation of the office of the comptroller since 1966 that other motor fuel, sold to a contractor for use in fulfilling a contract with the state or a county or other political subdivision for construction, reconstruction, maintenance or repair, subjected the distributor to the 10 cent per gallon tax under Section 10077-07. The office of the comptroller has at all times since 1966 attempted to collect such tax. Regulation 4-B, issued by the comptroller April 6, 1971, was not meant to and did not have the effect of changing either the law or the policy of the comptroller's office in any way, and was issued only for the purpose of eliminating possible confusion between the status of fuel sold to public contractors and that sold to private contractors.

8. There was testimony from Thomas H. Webb concerning certain conversations allegedly had with a former comptroller, and certain self-serving correspondence referring to such conversations was introduced. Considering all of the evidence as a whole, it is evident that such conversations were no more than attempts to negotiate or compromise a dispute. When payment was not forthcoming even on a compromised basis, an audit was made which led directly to the assessment in question. In any event, an oral conversation by the comptroller would not bind the state, and the comptroller would not have the authority to forgive taxes. the liability for which had accrued.

9. Taxpayer seemed to contend at the hearing that it was not audited and assessed expeditiously enough. However, the proof showed that the revenue examiners and office personnel charged with investigating and handling this matter had many other simultaneous duties, and that the matter was handled as expeditiously as was reasonable to expect under the circumstances; and in any event, the taxpayer suffered no harm therefrom.

10. Much was also made at the hearing of the fact the comptroller's office had no field reports after 1967 and prior to May 5, 1971. However, the proof showed (a) that prior to January 1, 1970, there was little need for continuous field checks, due to a different method of payment of the tax; and (b) that after the law changed on January 1, 1970, considerable time was consumed before a system of regular field checks and reports was set up, and additional time was consumed before Mid-State, in the regular course of business, was first checked. The comptroller finds that such reports as this office had were delivered to taxpayer prior to the hearing. In any event, the presence or absence of any such reports has no bearing upon taxpayer's liability.

11. The amount due to the State of Mississippi on the sales of fuel set out in finding 4 above is $167,741.19 tax, after credit is given for the one cent tax levied under Section 10078-107, which has been paid, and the penalty is $30,802.07, for a total of $198,543.26. Demand was made by the comptroller's office on January 24, 1972, for payment of $157,210.54, and demand was made for the whole sum due on August 1, 1972.

LEGAL CONCLUSIONS

In the opinion of the comptroller, there is no doubt that the 10 cent tax levied on "Other Motor Fuels" by Mississippi Code of 1942, Section 10077-01, et seq., was imposed under the law upon diesel fuel where used as a heating agent in the treatment of raw material

in manufacturing asphalt for use in paving roads and highways under contract with the Mississippi State Highway Department. Under these circumstances, the tax is not confiscatory, and is not a denial of the equal protection of the laws or due process of law under the Fourteenth Amendment of the United States Constitution, or under Constitution of the State of Mississippi, and the statute is not ineffective or void.

ORDER

IT IS, THEREFORE, ORDERED that the taxpayer, Standard Oil Company, shall be and is hereby required to pay forthwith to the State of Mississippi the sum of $198,543.26, for tax and penalty as stated above, together with interest at six percent per annum on $157,210.54 from January 24, 1972, through July 31, 1972 and on $198,543.26 from August 1, 1972 until paid, failing which the comptroller will take such action as is by law provided.

SO ORDERED, this the 18 day of July, 1973.

/s/ Doxey Fisher

Motor Vehicle Comptroller

[APPENDIX F]

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT

HINDS COUNTY, MISSISSIPPI

NO. 90,231

IN THE MATTER OF THE ASSESSMENT AND DEMAND OF THE MOTOR VEHICLE COMPTROLLER DEMANDING PAYMENT FROM STANDARD OIL COMPANY OF THE SUM OF $198,543.26 IN TAXES BASED ON SALES OF NO. 2 HEATING FUEL TO MID-STATE PAVING COMPANY

STANDARD OIL COMPANY
APPELLANT
VS.
DOXEY FISHER, MOTOR VEHICLE COMPTROLLER, STATE OF MISSISSIPPI
APPELLEE

OPINION OF THE COURT

(Filed March 13, 1974)

The Motor Vehicle Comptroller entered an order on July 18, 1973, confirming previous assessments of taxes and penalties against Standard Oil Company, involving the sale by Standard of a large quantity of

No. 2 oil, commonly known as "diesel fuel," to Mid-State Paving Company. Standard was ordered to pay the sum of $198,543.26 plus interest. Standard appeals to this court in accord with the procedure set out in Section 10077-20, Miss. Code 1942 (Section 27-55-339, Miss. Code 1972).

The Comptroller's order was based on his interpretation of Section 10077-07, Miss. Code 1942 (Section 27-55-313, Miss. Code 1972), the first paragraph of which is as follows:

> "A tax at the rate of ten cents per gallon is hereby levied upon any distributor of other motor fuel for the privilege of engaging in the business of selling or delivering other motor fuel to a retail dealer, user, or any other person for use in propelling motor vehicles on the highways of this state and/or for the privilege of engaging in the business of selling and delivering other motor fuel to any other person who purchases or uses other motor fuel in performing contracts for construction, reconstruction, maintenance or repairs, where such contracts are entered into with the State of Mississippi, any political subdivision of the State of Mississippi, or any department, agency, or institution of the State of Mississippi or any political subdivision thereof, if the first notice of publication to bidders on such contract has been given after September 1, 1966. . . ."

The record made at the hearing before the Comptroller reveals the following:

Mid-State Paving Company is a Mississippi corporation engaged in asphalt paving. It operates its own plants, and processes the materials necessary to produce the asphalt utilized in its paving contracts.

One of the ingredients in asphalt is sand, which must be dried by the application of heat. Generally, the fuel used in processing sand in the manufacture of asphalt is either liquefied compressed gas (propane) or diesel fuel, the latter falling within the definition of "other motor fuel" set out in Sec. 10077-02 (d), Miss. Code 1942 (1972 Suppl.) (Sec. 27-55-303 (d), Miss. Code 1972 (1973 Supp.)), as follows:

> "(d) 'Other motor fuel' means all combustible gases and liquids used or usable for the generation of power for propulsion of motor vehicles except that it does not include gasoline as defined in the gasoline tax law nor does it include liquefied compressed gas."

From January 1, 1970, through the month of March, 1972, Mid-State purchased a total of 1,863,791 gallons of diesel fuel from Standard to be utilized only for the extraction of moisture from sand, by heat process, in the manufacture of asphalt to be used in carrying out its paving contracts with the Mississippi Highway Department.

In selling this diesel fuel to Mid-State, Standard then took the view that a tax of one cent (1¢) per gallon was imposed under the provisions of Sec. 10078-107, Miss. Code 1942, when such fuel was to be used as a heating agent. It did not consider that such fuel was within the purview of the ten cents (10¢) per gallon tax levied under Sec. 10077-07, Miss. Code 1942, since it was not to be used in internal combustion engines. It was on this assumption that Standard quoted its prices to Mid-State.

At this point, it should be noted that Standard now contends that even the tax of one cent (1¢) per gallon on diesel fuel used as a heating agent was wrongfully

assessed by the Comptroller. However, it takes the position that the assessment of this tax is only indirectly involved, for the reason that it has been paid (in the sum of $18,637.91) and that it was collected from Mid-State in accord with the quoted price and was, consequently, included in Mid-State's bid submitted to the Highway Department as a component of the asphalt used in the paving contracts. Standard bases this contention on an opinion issued by the Attorney General in a letter addressed to Mr. Joe Sharp, the then Motor Vehicle Comptroller, dated March 12, 1971. Although this opinion is not an adjudication, it was introduced in evidence during the hearing before the Comptroller, and it has a bearing on the chain of events in this matter. The Attorney General based his opinion on Section 13 of Chapter 57, Laws of the Extraordinary Session of 1969 (appearing as Sec. 10078-113, Miss. Code 1942 (1972 Supp.) and as Sec. 27-57-327, Miss. Code 1972) wherein the following language appears:

> "There shall not be included in the measure of the tax levied hereunder any oil or liquefied compressed gas . . . (g) . . . where used as a processing agent in the treatment of raw material in manufacturing any product."

On April 6, 1971, Mr. Sharp, the then Comptroller, issued "Regulation No. 4-B" wherein it is directed that diesel fuel used in extracting moisture from sand to be mixed with asphalt will be exempt from the one cent (1¢) per gallon tax levied under Sec. 10078-107, Miss. Code 1942, in accord with the Attorney General's opinion of March 12, 1971. However, the following proviso appears in Regulation 4-b:

> "Provided however, that nothing in this Regulation shall relieve any person or persons from the

> Ten Cents (10¢) per gallon tax levied in Section 10077-07, Mississippi Code of 1942, as Amended, on diesel fuel and kerosene used to extract moisture from sand to be mixed with asphalt when such asphalt is to be used in the performance of a contract with the State of Mississippi or any political sub-division thereof, when such asphalt is produced by a person or persons holding such contracts with the State of Mississippi or any political sub-division thereof.
>
> "This Regulation shall be effective from and after April 15, 1971."

On January 10, 1973, the Speaker of the Mississippi House of Representatives wrote a letter to the Attorney General asking an opinion on the authority of the Motor Vehicle Comptroller to promulgate the proviso in Regulation 4-B. He also requested an opinion from the Attorney General as to whether or not the said proviso subjects a distributor to the ten cents (10¢) per gallon tax under the circumstances referred to in the Regulation. Parenthetically, at this time Mr. Sharp was no longer the Motor Vehicle Comptroller, the present Comptroller being then in office.

The Attorney General's opinion issued in response to the Speaker's request, dated January 16, 1973, takes the view that the former Comptroller's Regulation 4-B was based on a false premise of liability insofar as the ten cents (10¢) tax is concerned. The Attorney General's opinion further states:

> "It is, therefore, the opinion of this office that diesel fuel and kerosene used as a 'processing agent' for drying sand to be mixed with asphalt when such asphalt is to be used in the performance of contracts with the State of Mississippi, or any

political subdivision thereof, is not liable for the tax imposed by Section 10077-07 . . . even when such asphalt is produced by a person, or persons, holding such contracts with the State of Mississippi, or any political subdivision thereof."

Although the Attorney General's opinion of January 16, 1973, is advisory only, nevertheless it appears in the record before this court, and it is most apparent that it was relied upon by Standard at the hearing before the Comptroller.

The Comptroller's order demands the payment of $198,543.26 in taxes and penalties as follows:

Taxes assessed at 10¢ per gallon on 1,863,791 gallons diesel fuel	$186,379.10
Less this amount paid by Standard (1¢ per gallon on 1,863,791 gallons diesel fuel)	18,637.91
	167,741.19
Penalty	30,802.07
	$198,543.26

In addition, Standard is required by the order to pay interest at the rate of 6% per annum on $156,210.54 from January 24, 1972, through July 31, 1972, and on $198,543.26 from August 1, 1972, until paid.

The Comptroller contends that a construction of the first paragraph in Section 10077-07, Miss. Code 1942 (Section 27-55-313, Miss. Code 1972) requires that the language contained therein be separated into two distinct parts. He takes the position that the first part, that is to say,

> "A tax at the rate of Ten Cents (10¢) per gallon is hereby levied upon any distributor of other motor fuel for the privilege of engaging in the business of selling or delivering other motor fuel to a retail dealer, user, or any other person for use in propelling motor vehicles on the highways of this State . . ."

refers to the use, and only to the use of such fuel in internal combustion engines employed in motor vehicle propulsion, and that such use is not in issue here. He contends, however, that the second part of this paragraph, that is to say,

> ". . . and/or for the privilege of engaging in the business of selling and delivering other motor fuel to any other person who purchases or uses other motor fuel in performing contracts for construction, reconstruction, maintenance or repairs, where such contracts are entered into with the State of Mississippi, any political subdivision of the State of Mississippi, or any department, agency, or institution of the State of Mississippi or any political subdivision thereof, if the notice of publication to bidders on such contract has been given after September 1, 1966 . . ."

takes into its purview *any use whatever* of such "other motor fuel" (which term includes diesel fuel), so long as such use is in connection with contracts with the State or any political subdivision thereof *in the performance of construction, reconstruction, maintenance, or repairs, including the use of such fuel as a heating agent for the extraction of moisture from sand to be used in the manufacture of asphalt.*

Standard, on the other hand, takes the position that the fuel tax statutes must be considered as a whole in order to properly construe the meaning of Section 10077-07, Miss. Code of 1942. It contends that when these statutes (Laws of the Extraordinary Session of

1969, Chs. 54-60, appearing as Sections 10076-10079, Miss. Code 1942) are considered together, it must be concluded that Section 10077-07 refers only to the use of such motor fuel in internal combustion engines.

The fuel tax statutes enacted in the Extraordinary Legislative Session of 1969 became effective on January 1, 1970. The Mississippi Code of 1942 divides this series of Acts into Articles. These Articles and their subjects are as follows:

Article 6	.....	gasoline;
Article 7	.....	other motor fuels;
Article 8	.....	oils:
Division 1	.....	lubricating oils;
Division 2	.....	other oils;
Article 9	.....	liquefied compressed gas.

This case is primarily concerned with Article 7 (other motor fuels), Section 10077-01, et seq., and Division 2 of Article 8 (other oils), Sections 10078-101 through 10078-139.

Certain of the definitions set out in Section 10077-02, Miss. Code 1942 (1972 Supp.), dealing with the subject of "other motor fuels," are most important to this decision. They are as follows:

> "(b) 'Highway' means every way or place, of whatever nature, including public roads, streets, and alleys of this State generally open to the use of the public or to be opened or reopened to the use of the public for the purpose of vehicular travel, and notwithstanding that the same may be temporarily closed for the purpose of construction, reconstruction, maintenance or repair. Provided that the confines of a highway shall include the entire width and length of the right-of-way."

> "(c) 'Motor vehicle' means every vehicle that is required by law to be licensed for highway use by which any person or property is transported or drawn upon the highways of this State and which is self-propelled."*
>
> "(d) 'Other motor fuel' means all combustible gases and liquids used or usable for the generation of power for propulsion of motor vehicles except that it does not include gasoline as defined in the gasoline tax law nor does it include liquefied compressed gas.
>
> "(e) 'Use' means, in addition to its ordinary meaning, the receipt of other motor fuel by any person into the fuel supply tank of a motor vehicle or into a receptacle from which other motor fuel is supplied by any person for his own or other motor vehicles.
>
> "(f) 'Distributor of other motor fuel' means any person who imports, receives or acquires other motor fuel for sale or delivery to a retail dealer or user as herein defined; provided, however, that no person may qualify as a distributor for the sole purpose of using other motor fuel, as defined in this act, as a fuel to propel a motor vehicle or motor vehicles owned, leased or operated by him on the highways of this State.

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*This definition was amended (Laws of 1973, Ch. 429) to eliminate the requirement that such motor vehicle must be licensed. Section 27-55-303 (c), Miss. Code 1972 (1973 Supp.) is as follows: " 'Motor vehicle' means every vehicle designed, constructed for or used on the highways of this state which is self-propelled, except a farm tractor using the highways solely in hauling or transporting farm produces of the soil from the farm to a gin or market which (sic) the title to such products is still in the producer, or a farm tractor used in transporting fertilizer or food to a farm which (sic) the title to such products is still in the user."

"(g) 'Retail dealer' means any person not licensed as a distributor of other motor fuel, who dispenses other motor fuel into the fuel tanks of motor vehicles for the propulsion of said motor vehicles or into receptacles for consumption in motor vehicles.

"(h) 'User' means any person who purchases or acquires other motor fuel for use in motor vehicles or who dispenses other motor fuel for consumption in such motor vehicles owned, leased or operated by him. The term 'user' shall not include the United States Government when purchases of other motor fuel are made for use of the Armed Forces only and delivered in quantities of not less than four thousand (4,000) gallons."

Standard's position, more concisely expressed, is as follows: The language in Section 10077-07, Miss. Code 1942 (Section 27-55-313, Miss. Code 1972), relating to contracts with the state or any political subdivision, has reference to, and only to, the use of such fuel as a propellant in internal combustion engines used in connection with machinery or apparatuses which are not ordinarily classed as "motor vehicles," and which would not be taxed at the rate in question were it not for the statute. It contends that a consideration of the fuel tax laws as a whole negates any other interpretation.

At the threshold of a consideration of the opposing views taken by the parties, it becomes necessary to apply the rule regarding the construing together of all statutes involved in a question in order to discover the legislative intent. One hundred and seventy years ago the general rule was set out by the United States Supreme Court in the case of Pennington v. Coxe, 1

U.S. (2 Cranch) 346 (1804), whereir. Chief Justice John Marshall said:

> "The law is the best expositor of itself, *that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature, and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act,* are among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged." (Emphasis added)

The rule in Mississippi was stated by our Court in the case of Jackson County v. Meaut, 185 Miss. 235, 189 So. 819, 820 (1939) as follows:

> "It is a familiar rule of construction that all statutes bearing upon a subject involved in a controversy are to be construed together, and the legislative purpose deduced from the whole . . ."

In considering the definitions set out in Section 10077-02, Miss. Code 1942, it becomes apparent that the heading of Article 7, itself, conveys the unequivocal meaning to be attached to the nature of the subject therein treated, that is to say, fuels used in *motors*, other than gasoline and liquefied compressed gas. Clearly, this Article is concerned with "other *motor* fuels," i.e., according to the definition, gases and liquids *used or usable for the generation of power for propulsion of motor vehicles.* It is in this context that the entire Article is written. The word "use." in addition to its ordinary meaning, is defined as the receipt of this type of fuel by any person *into the fuel supply tank of a motor vehicle.* A "distributor," according to the definition, is a person who supplies "retail dealers" or "users" of this fuel, and, in turn, a "retail dealer" is

defined as any person not a distributor who dispenses such fuel *into the fuel tanks of motor vehicles for the propulsion of such motor vehicles or into receptacles for consumption in motor vehicles*, and a "user" is defined as any person who purchases or acquires such fuel *for use in motor vehicles* or who dispenses such fuel *for consumption in such motor vehicles owned, leased or operated by him.*

At the times here in question, the word "motor vehicle" was defined by the statute as every vehicle required by law to be licensed for highway use by which any person or property is transported or drawn on the highways of this state, which is self-propelled. There are, of course, certain types of self-propelled machinery and apparatuses equipped with reciprocating internal combustion engines powered by such "other motor fuel" which are used in highway construction and paving, and which are not required by law to be licensed for highway use, e.g., earth-moving machinery, asphalt spreaders, rollers, etc. These types of machinery are not "motor vehicles," but they require *motor fuel* as a propellant. This court is of the opinion that the statute in controversy simply places the same tax on "other motor fuel" (in this case, diesel fuel) when used in such internal combustion engines as would be levied on such fuel used in "motor vehicles," where such use is in connection with contracts with the state or its political subdivisions. In accord with the context and connotations of Article 7, this court is of the opinion that the statute in controversy did not take into its purview the use of diesel fuel for any purpose other than as a motor fuel.

This view is fortified by the fact that diesel fuel is also the subject of another Article in the fuel tax laws, that is to say, Division 2 of Article 8. These

statutes (Sections 10078-101 through 10078-139, Miss. Code 1942 (Sections 27-57-301 through 27-57-371, Miss. Code 1972)) are concerned with "other oils," including ". . . kerosene, diesel fuel, fuel oils, distillate, gas oil, tractor fuel, commercial solvents and industrial naphthas, liquefied compressed gas, and any petroleum fuel and any other product other than gasoline, as defined in this Act, which is usuable as fuel in an internal combustion engine . . ." This Article takes into its purview the taxation of such "other oils" regardless of how they are used. In other words, although such "other oils" are defined as those *usable* in internal combustion engines, they are not treated within the narrow confines of use as "motor fuels" as in the case in Article 7.

Section 10078-107, Miss. Code 1942 (Section 27-57-315, Miss. Code 1972) imposes on the distributor a 1¢ per gallon tax on diesel fuel received by him in this state, when such fuel is utilized for "non-highway purposes," that is to say, no part of which is used for operating motor vehicles or motor propelled machines of any description along the public roads, streets, alleys or highways of this state. The definition for such "non-highway purposes" is set out in Section 10078-102 (n), Miss. Code 1942 (Section 27-57-305, Miss. Code 1972).

Since using diesel fuel as a heating agent to remove moisture from sand is clearly a "non-highway" use, Standard paid a tax of 1¢ per gallon on the 1,863,791 gallons sold to Mid-State for such use in the performance of its paving contracts with the State Highway Department. The sum thus paid is not in controversy here, for the reason that this charge was passed on to Mid-State, and Mid-State figured this tax in its bids submitted to the State Highway Department. However, it is noted by the court that diesel fuel is exempt from the 1¢ tax imposed under Section 10078-107 when

such fuel is used as a processing agent in the treatment of raw material (in this case, sand) in manufacturing any product (in this case, asphalt). Section 10078-113, Miss. Code 1942 (Section 27-57-327, Miss. Code 1972) states:

> "There shall not be included in the measure of the tax levied hereunder any oil . . . (g) . . . sold or delivered to any person . . . where used as a processing agent in the treatment of raw material in manufacturing any product."

The Comptroller contends that the treatment of the sand used in manufacturing the asphalt used in Mid-State's contracts does not come within the exemption above quoted, for the reason that such processing was a part of Mid-State's contract with the Highway Department, and not a separate manufacturing procedure. In other words, the Comptroller takes the position that if Mid-State had purchased the asphalt from a manufacturer of that material instead of manufacturing it in its own plant, the diesel fuel used as a heating agent would be non-taxable to such manufacturer under the above-quoted exemption, and would not be taxable to Mid-State under Section 10077-07 because it would not be a "motor fuel" used in performing the contract. This contention is not sound. First of all, the exemption statute makes no exception; it simply states that the tax is not imposed where diesel fuel is used as a processing agent *in the treatment of raw material in manufacturing any product.* Secondly, to engage in such hair-splitting distinctions would, indeed, be an abandonment of substance for the sake of form, thereby creating a fiction.

This court takes the position that the statutes involved in this case, and the legislative intent in their

enactment, are clear. In the opinion of this court, the ten cents (10¢) tax levied under Section 10077-07 takes into its purview "other motor fuel" *used as such* in the performance of contracts with the state or any political subdivision, i.e., *used as motor fuel*; and that this statute does not impose a tax on diesel fuel utilized as a heating agent in processing sand in the manufacture of asphalt to be used in the performance of such contracts.

Moreover, it is the opinion of this court that even if it could be said that Section 10077-07 is not plain and concise, or that it is ambiguous, this matter should, nevertheless, be resolved in favor of Standard, since the revenue laws must be strictly construed against the state and in favor of the taxpayer. This rule is set out in Mississippi State Tax Commission v. Hogg, 239 Miss. 597, 124 So. 2d 300, 304 (1960), as follows:

> "It is well established by numerous prior decisions of this Court that revenue laws ought to be strictly construed against the taxing power and that all doubts shall be resolved in favor of the taxpayer. Stone v. Rogers, 186 Miss. 53, 189 So. 810; Pan-American Petroleum Corp. v. Miller, 154 Miss. 565, 122 So. 393; Stone v. General Box Company, 212 Miss. 60, 53 So. 2d 85."

See also Chickasaw County v. G.M. & O. R. Co., 195 Miss. 754, 15 So. 2d 348, 351 (1943), citing Gulf & S. I. R. Co. v. Harrison County, 192 Miss. 114, 4 So. 2d 717 (1941).

Moreover, where a doubt may exist because of an inherent ambiguity in a tax statute, the taxpayer is entitled to the benefit of the doubt. In State Tax Commission v. Edmonson, 196 So. 2d 873, 877 (Miss. 1967), it was said:

"If, however, under the facts of this case an ambiguity in the statute does exist, this ambiguity must be construed most favorably toward the taxpayer, and the Commission cannot by regulation extend the purview of the taxing statute . . ."

In view of the holding of this court, it is not necessary to consider and render an opinion regarding Standard's contention that the statute in question is void under the Fourteenth Amendment of the Constitution of the United States, in that a tax imposed on diesel fuel and not imposed on liquefied compressed gas used for the same purposes constitutes the invidious discrimination in violation of the equal protection and due process clauses.

The order of the Motor Vehicle Comptroller, dated July 18, 1973, is reversed, and a decree will be rendered by this Court in favor of Standard Oil Company. All costs shall be assessed against the Motor Vehicle Comptroller. Such decree will be drawn and submitted accordingly.

/s/ Geo. Wm. Haynes
Chancellor

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT
HINDS COUNTY, MISSISSIPPI

NO. 90,231

STANDARD OIL COMPANY
APPELLANT
V.
DOXEY FISHER, MOTOR VEHICLE COMPTROLLER OF THE STATE OF MISSISSIPPI
APPELLEE

FINAL DECREE

(Filed March 14, 1974)

This cause came on for hearing on the appeal of Standard Oil Company to this Court pursuant to Section 10077-20, Mississippi Code of 1942 (Section 27-55-339, Mississippi Code of 1972), from an Order of the Motor Vehicle Comptroller of the State of Mississippi dated July 18, 1973, confirming previous assessments of taxes and penalties against Standard Oil Company involving the sale by Standard of a large quantity of No. 2 oil, commonly known as "diesel fuel" to Mid-State Paving Company, under which Standard Oil Company was ordered to pay to the State of Mississippi the sum of $198,453.26 plus interest, and this Court having heard same as a preferred case on the record made at the hearing before the Comptroller, finds:

1. The Comptroller erred in assessing a tax on said diesel fuel and in ordering the same paid.

2. The disputed tax was not legally levied or authorized under the Revenue Act of 1969 and the Comptroller erred in finding the contrary.

3. The decision and Order of the Comptroller is contrary to the weight of the evidence and is contrary to reason and is contrary to law.

4. The Comptroller erred in ordering Standard Oil Company to pay said tax, penalty and interest.

5. Said Order of the Comptroller violates the statutory duties of the Comptroller and the statutory rights of Standard Oil Company.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that said Order of the Motor Vehicle Comptroller of the State of Mississippi dated July 18, 1973 be and the same is hereby reversed and vacated and that Standard Oil Company be and it is hereby finally released and discharged from any liability to the State of Mississippi under said Order of the Motor Vehicle Comptroller or under any of the previous assessments of taxes and penalties upon which said Order of July 18, 1973 was based or predicated, and that the Appellee be and he is hereby enjoined from making any further efforts to enforce said assessments or to collect said taxes or penalties.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that The Ohio Casualty Insurance Company as the surety on Appellant's supersedeas appeal bond filed herein dated August 3, 1973, countersigned August 6, 1973, filed and approved with the Clerk of this Court August 14, 1973, recorded in Miscellaneous Bond Book 06 at pages 447 through 449, be and

it is hereby fully and finally released and discharged from any liability thereunder.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all Court costs incurred herein be and the same are hereby taxed against the Appellee, Motor Vehicle Comptroller.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Opinion of the Court filed herein March 13, 1974, be and the same is made a part hereof by reference.

ORDERED, ADJUDGED AND DECREED this 14th day of March, 1974.

/s/ Geo. Wm. Haynes
Chancellor

Approved As to Form:

/s/ Thos. H. Watkins
Of Counsel for Appellant

/s/ Curtis E. Coker
Of Counsel for Appellee

[APPENDIX G]

IN THE SUPREME COURT OF MISSISSIPPI

NO. 48,314

(October 13, 1975)

ROBERT G. SHARPE, MOTOR VEHICLE COMPTROLLER, STATE OF MISSISSIPPI

V.

STANDARD OIL COMPANY

BEFORE RODGERS, SUGG AND BROOM

SUGG, JUSTICE, FOR THE COURT:

This case involves the validity of a tax of ten cents per gallon assessed by the Motor Vehicle Comptroller under Mississippi Code Annotated section 27-55-313 (1972) on diesel fuel sold by Standard Oil Company to Mid-State Paving Company for use in the performance of State Highway Commission contracts. The Comptroller's assessment was reversed by the Chancery Court for the First Judicial District of Hinds County, Mississippi, on the ground that the statute taxes only diesel fuel used in motor vehicles.

The question is whether the tax applies only to diesel fuel used in motor vehicles by a contractor in

the performance of state contracts, or whether the tax applies to all diesel fuel used by a contractor in the performance of state contracts regardless of the specific on-the-job uses made of the fuel.

Mid-State is a Mississippi corporation primarily engaged in asphalt paving work on the highways of the State of Mississippi and its political subdivisions. The asphalt used by Mid-State is produced by mixing and processing various materials in portable asphalt plants usually set up near the construction site. One of the materials is sand which must be dried by the application of heat to extract any moisture. The fuel generally used in the process is diesel fuel which falls within the definition of "other motor fuel" under Mississippi Code Annotated section 27-55-303(d) (1972).[1] A tax of ten cents per gallon is levied upon the distributor of other motor fuel by the first paragraph of section 27-55-313.

> A tax at the rate of ten cents per gallon is hereby levied upon any distributor of other motor fuel for the privilege of engaging in the business of selling or delivering other motor fuel to a retail dealer, user, or any other person for use in propelling motor vehicles on the highways of this state and/or for the privilege of engaging in the business of selling and delivering other motor fuel to any

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1. Other motor fuel is defined by § 27-55-303(d) as follows:

> "Other motor fuel" means all combustible gases and liquids used or usable for the generation of power for propulsion of motor vehicles except that it does not include gasoline as defined in the gasoline tax law nor does it include liquefied compressed gas.

Gasoline and liquefied compressed gas are separately defined and taxed by other statutes. *See* Mississippi Code Annotated §§ 27-55-1 et seq.; 27-59-1 et seq. (1972)

other person who purchases or uses other motor fuel in performing contracts for construction, reconstruction, maintenance or repairs, where such contracts are entered into with the State of Mississippi, any political subdivision of the State of Mississippi, or any department, agency, or institution of the State of Mississippi or any political subdivision thereof, if the first notice of publication to bidders on such contract has been given after September 1, 1966.

Mid-State was of the opinion that the tax did not apply to diesel fuel used to process asphalt in the performance of its contracts with the Highway Commission. Accordingly, it did not pay Standard the tax on the fuel used in processing asphalt, but agreed to indemnify Standard for any of the tax ultimately paid by Standard. The Comptroller maintained that section 27-55-313 levied the ten cents per gallon tax on diesel fuel used by a contractor in the performance of state contracts regardless of the specific on-the-job uses of the fuel. He assessed taxes and penalties in the amount of $198,543.26 against Standard for diesel fuel sold by it to Mid-State from January 1, 1970, through March of 1972. This assessment was later confirmed by the Comptroller after a hearing. On appeal to the Chancery Court for the First Judicial District of Hinds County the assessment was reversed, the chancellor holding that the taxing statute taken as a whole evinced a legislative intent to tax only motor fuel used in internal combustion engines.

Mississippi Code Annotated section 27-55-313 (1972) is clear and unambiguous on its face, addressing itself to two classes of users of other motor fuel. The first part of the section is designed to apply to those per-

sons who use other motor fuel in propelling motor vehicles on the highways of the state. The second part is not so limited, being addressed simply to "any other person" purchasing or using other motor fuel in the performance of state contracts. Unlike the terms "retail dealer" and "user" found in the first part of section 27-55-313, "person" is not by definition limited to one who uses other motor fuel only in motor vehicles. As defined in the statute, "use" also contemplates uses other than motor vehicle use, hence the definition:

> (e) "Use" means, *in addition to its ordinary meaning*, the receipt of other motor fuel by any person into the fuel supply tank of a motor vehicle or into a receptacle from which other motor fuel is supplied by any person for his own or other motor vehicles. (Emphasis supplied).

The statute means what it says: All of the other motor fuel purchased or used by a person in the performance of state contracts is subject to the ten cents per gallon tax.

In spite of this language Standard maintains, and the chancellor held, that the section does not contemplate taxing fuel used to heat asphalt to be used in the performance of a state contract because other fuel taxing sections either tax fuel used only in vehicles or exempt fuel used as a processing agent in manufacturing. *See* Mississippi Code Annotated sections 27-57-315, -327 (g) (1972). Reliance is also placed upon two opinions by the Attorney General relative to the tax.

We are not persuaded by the argument for it overlooks the unequivocal language of the statute (27-55-313) and its legislative history. At the hearing before the

Comptroller, Mr. Adlia Morgan, Director of Petroleum Taxes for the Motor Vehicle Comptroller, testified that the language dealing with contractors in the current diesel law (section 27-55-313) came about through a 1958 amendment to the gasoline act (section 27-55-1 et seq.). Mr. Morgan said that prior to 1958 many contractors were including in their bids with the Highway Commission the state excise tax on gasoline, and later securing a refund of the tax on the gasoline used for non-highway purposes. The practice was known as "double dipping" because the contractors would recover the tax twice. In an effort to stop this practice, Mr. Morgan testified that he helped draft an amendment to the refund gasoline section designed to prevent contractors from claiming a refund on gasoline used in the performance of a state contract. The amendment made no distinction in the specific job site use of gasoline, but simply provided that:

> [N]o refund shall be allowed to any person, firm or corporation who may purchase, sell or use gasoline in performing contracts for construction, reconstruction, maintenance or repair, where such contracts are entered into with the State of Mississippi or with any department, agency or institution of the State of Mississippi, or with any political subdivision of the State of Mississippi, or with any department, agency or institution of such political subdivision. (Mississippi Laws 1958, chapter 180, section 11).

Mr. Morgan further testified that in 1966 the "double dipping" provision in the gas act of 1958 was brought forward into the diesel tax law, the difference being that the gasoline act involved a refund, but the diesel act involved an exemption:

> Provided, further, no exemption shall be allowed to any person, firm or corporation who may purchase, sell or use diesel fuel or kerosene in performing contracts for construction, reconstruction, maintenance or repair, where such contracts are entered into with the State of Mississippi or with any department, agency or institution of the State of Mississippi, or with any political subdivision of the State of Mississippi, or with any department, agency or institution of such political subdivision. (Mississippi Laws 1966, chapter 645, section 11).

The effect of the 1966 amendment was to tax diesel fuel when used by a contractor in the performance of a contract with the state or any of its political subdivisions. Section 7 of chapter 54 of the Laws of 1969 (codified at Mississippi Code Annotated section 27-55-313 (1972)) continued taxing diesel fuel so used. *Compare* Mississippi Laws 1966, chapter 645, section 11, *with* Mississippi Laws 1969, chapter 54, section 7.

Although it is not necessary to determine the intent of the legislature as to section 27-55-313 because the act is plain and unambiguous, we find that the legislative intent was to coordinate the laws governing gasoline and other motor fuel used by contractors in the performance of state contracts and subject all of that fuel to the ten cents per gallon fuel tax regardless of the specific on-the-job uses.

Standard next contends that we should adopt the construction of the statute as set forth in an opinion of the Attorney General. The March 15, 1971, opinion of the Attorney General simply held that oil used to process asphalt is exempt from the one cent tax of Mississippi Code Annotated section 27-57-315

(1972) because of the "processing agent" exemption of section 27-57-327(g). This opinion was not addressed to the disputed ten cents tax of 27-55-313 nor did it refer to the use of other motor fuel by a contractor performing a state contract. Although the January 16, 1973, opinion by the Attorney General held that the ten cents per gallon tax was not due where fuel was used to process asphalt by a contractor having a state contract, the opinion contains two fatal weaknesses. It leaves out the critical words "to any other person who purchases or uses other motor fuel" found in section 27-55-313, and lifts the "processing agent" exemption from the one cent tax of section 27-57-315 and inserts it into the ten cents tax of section 27-55-313.

Standard's final contention involves a constitutional challenge. The argument is that to subject diesel fuel to the tax, when used as a heating agent, is discrimination violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution because other heating fuels, notably propane, are not subject to the disputed tax. The tax, it is urged, would increase the cost of diesel fuel to such proportions that Standard's business of selling diesel fuel for use as a heating agent would be destroyed in the same manner as the business in *Riley* v. *Ayer and Lord Tie Co.*, 147 Miss. 105, 113 So. 214 (1927). In *Riley* a privilege tax of twenty-five cents per thousand feet of lumber treated by creosoting plants was held to violate the equal protection clause because the taxpayer's whole business was destroyed by the tax, other like businesses not being so taxed. *Riley* is not dispositive of the constitutional question before us, for while the entire production of the creosoting business was taxed in that case, only one

specific use of one specific product is being taxed in the instant case: The use of diesel fuel by a contractor to heat asphalt to be used in the performanc of a state contract.

Subtle distinctions are, of course, not controlling on this constitutional matter. The correct inquiry is whether the classification is related to a legitimate state interest and, if so, whether the means chosen to effectuate that interest are reasonable. Kahn v. Shevin, 416 U.S. 351, 355, 94 S.Ct. 1734, 40 L.Ed. 2d 189 (1974); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed. 2d 480 (1959); Ohio Oil Co. v. Conway, 281 U.S. 146, 50 S.Ct. 310, 74 L.Ed. 775 (1930); F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989 (1920); State v. Paramount-Gulf Theaters, Inc., 226 Miss. 404, 84 So.2d 403 (1956); Southern Package Corp. v. State Tax Commission, 174 Miss. 212, 164 So. 45 (1935). Nowhere is the power of classification accorded more latitude than in the field of taxation. While subject to the demands of the Fourteenth Amendment, "that amendment imposes no iron rule of equality. . . ." Ohio Oil Co. v. Conway, *supra*, 281 U.S. at 159, 50 S.Ct. at 314, 74 L.Ed. at 782. *Accord* Allied Stores of Ohio, Inc., *supra*, 358 U.S. at 526, 79 S.Ct. at 440, 3 L.Ed.2d at 484; New York Rapid Transit Corp. v. New York, 303 U.S. 573, 578, 58 S.Ct. 721, 82 L.Ed. 1024 (1938). The state may tax certain kinds of property yet exempt others. Heisler v. Thomas Colliery Co., 260 U.S. 245, 255, 43 S.Ct. 83, 67 L.Ed. 237 (1922).

The United States Supreme Court has addressed the instant classification problem on several occasions. *Heisler*, *supra*, concerned a state taxing statute which

levied a tax on anthracite coal production. Suit was brought alleging that the tax violated the equal protection clause because anthracite coal was taxed while bituminous coal was not taxed. The Court held that the natural difference between the two coals constituted a "just basis for their different classification," and accordingly, upheld the tax. 260 U.S. at 257, 43 S.Ct. at 85, 67 L.Ed. at 242. *Lake Superior Consolidated Iron Mines* v. *Lord*, 271 U.S. 577, 46 S.Ct. 627, 70 L.Ed. 1093 (1926) involved a like tax levied upon ore lands but not upon other producing lands such as quarries and forests. Citing *Heisler, supra*, the Court affirmed the tax classification on the basis of the differences in the natural resources. 271 U.S. at 582, 46 S.Ct. at 629, 70 L.Ed. at 1101. In *Broad River Power Co.* v. *Query*, 288 U.S. 178, 53 S.Ct. 326, 77 L.Ed. 685 (1933), a suit was filed contesting the validity of a South Carolina law that taxed the production of electricity by hydroelectric power but not the production of electricity by oil or internal combustion engines. Again citing *Heisler, supra*, the Court held that the existence of comparatively few internal combustion electric plants was sufficient reason for creating the tax classification. 288 U.S. at 179-80, 53 S.Ct. at 327, 77 L.Ed. at 686. *See also* Allied Stores of Ohio, Inc., *supra*.

The foregoing demonstrates that no constitutional difficulties are raised by the fact that, within the tax classification of "other motor fuel [used] in performing contracts . . . with the state," the tax is applied to diesel fuel used by a contractor as a heating agent but not to propane used as a heating agent. The record shows that the state interest behind the tax is the prevention of "double dipping." The means chosen

to halt this practice is the termination of all refund and exemption privileges for contractors using gasoline and other motor fuel in the performance of state contracts. In this way the contractors may recover their fuel tax cost but once through the contract bid and not a second time by way of a refund or exemption.

Finally, apart from the pronounced state interest in ending "double dipping," a more basic reason may be relied upon to sustain the discrimination between propane and diesel, specifically the inherent differences between propane and diesel fuel. These differences were testified to by a witness for the Comptroller and form in and of themselves a sufficient basis for the tax classification. Heisler, *supra*, 260 U.S. at 257, 43 S.Ct. at 85, 67 L.Ed. at 242; Allied Stores of Ohio, Inc., *supra*, 358 U.S. at 528, 79 S.Ct. at 441, 3 L.Ed. 2d at 486.

We, therefore, reverse the decree of the chancery court and reinstate the order of the Motor Vehicle Comptroller.

REVERSED AND ORDER OF THE COMPTROLLER REINSTATED.

GILLESPIE, C.J., AND PATTERSON, INZER, SMITH, ROBERTSON AND WALKER, JJ., CONCUR.

[APPENDIX H]

IN THE SUPREME COURT OF MISSISSIPPI

MONDAY, OCTOBER 13, 1975, COURT SITTING

ROBERT G. SHARPE, MOTOR VEHICLE COMPTROLLER, STATE OF MISSISSIPPI

#48,314 vs.

STANDARD OIL COMPANY

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court, First Judicial District of Hinds County and this Court having sufficiently examined and considered the same and being of the opinion that there is error therein doth order, adjudge and decree that the decree of said Chancery Court rendered in this cause on the 14th day of March, 1974-be and the same is hereby reversed and Order of the Motor Vehicle Comptroller reinstated. It is further ordered, adjudged and decreed that the appellee do pay all of the costs of this appeal to be taxed for which let proper process issue.

MINUTE BOOK "BR", PAGE 250

[APPENDIX I]

IN THE SUPREME COURT OF MISSISSIPPI

MONDAY, DECEMBER 8, 1975, COURT SITTING

ROBERT G. SHARPE, MOTOR VEHICLE COMPTROLLER FOR THE STATE OF MISS.

#48,314 vs.

STANDARD OIL COMPANY

This cause this day came on to be heard on Petition for Rehearing filed herein and this Court having sufficiently examined and considered the same En Banc and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied.

MINUTE BOOK "BR", PAGE 291

[APPENDIX J]

Mississippi Code of 1972:

§ 27-55-303. Definitions.

The words, terms and phrases as used in this article shall have the following meanings unless the context requires otherwise:

(a) "Person" means any individual, firm, copartnership, joint venture, association, corporation, estate, trust, or any other group or combination acting as a unit, and the plural as well as the singular number unless the intention to give a more limited meaning is disclosed by the context.

(b) "Highway" means every way or place, of whatever nature, including public roads, toll roads, streets, and alleys of this state generally open to the use of the public or to be opened or reopened to the use of the public for the purpose of vehicular travel, and notwithstanding that the same may be temporarily closed for the purpose of construction, reconstruction, maintenance or repair. Provided that the confines of a highway shall include the entire width and length of the right-of-way.

(c) "Motor vehicle" means every vehicle that is required by law to be licensed for highway use by which any person or property is transported or drawn upon the highways of this state and which is self-propelled.

(d) "Other motor fuel" means all combustible gases and liquids used or usable for the generation of power for propulsion of motor vehicles except that it does not include gasoline as defined in the gasoline tax law nor does it include liquefied compressed gas.

(e) "Use" means, in addition to its ordinary meaning, the receipt of other motor fuel by any person into the fuel supply tank of a motor vehicle or into a receptable from which other motor fuel is supplied by any person for his own or other motor vehicles.

(f) "Distributor of other motor fuel" means any person who imports, receives or acquires other motor fuel for sale or delivery to a retail dealer or user as herein defined; provided, however, that no person may qualify as a distributor for the sole purpose of using other motor fuel, as defined in this article, as a fuel to propel a motor vehicle or motor vehicles owned, leased or operated by him on the highways of this state.

(g) "Retail dealer" means any person not licensed as a distributor of other motor fuel, who dispenses other motor fuel into the fuel tanks of motor vehicles for the propulsion of said motor vehicles or into receptacles for consumption in motor vehicles.

(h) "User" means any person who purchases or acquires other motor fuel for use in motor vehicles or who dispenses other motor fuel for consumption in such motor vehicles owned, leased or operated by him. The term "user" shall not include the United States government when purchases of other motor fuel are made for use of the armed forces only and delivered in quantities of not less than four thousand gallons.

(i) "Comptroller" means the motor vehicle comptroller of the State of Mississippi, acting either directly or through his duly authorized officers, agents or employees.

[APPENDIX K]

Mississippi Code of 1972:

§ 27-55-313. Levy of tax.

A tax at the rate of ten cents per gallon is hereby levied upon any distributor of other motor fuel for the privilege of engaging in the business of selling or delivering other motor fuel to a retail dealer, user, or any other person for use in propelling motor vehicles on the highways of this state and/or for the privilege of engaging in the business of selling and delivering other motor fuel to any other person who purchases or uses other motor fuel in performing contracts for construction, reconstruction, maintenance or repairs, where such contracts are entered into with the State of Mississippi, any political subdivision of the State of Mississippi, or any department, agency, or institution of the State of

Mississippi or any political subdivision thereof, if the first notice of publication to bidders on such contract has been given after September 1, 1966.

Any person who shall, while not licensed as a distributor of other motor fuel or retail dealer, sell or deliver to other persons any other motor fuel upon which the tax levied by this article has not been paid shall be liable for the tax and penalties imposed by this article if the person selling or delivering such fuel knows or has reason to know that it will be used or sold for a taxable purpose.

Any user, as defined herein, who purchases, receives or acquires any other motor fuel upon which the tax has not been paid or is not covered by a valid bond of a distributor of other motor fuel shall be liable for the tax and penalties imposed by this article.

Any retail dealer who dispenses other motor fuel at a retail outlet into fuel tanks of motor vehicles owned by others, or into fuel tanks attached to such vehicles, may not avail himself of the privilege of purchasing and dispensing tax free other motor fuels, except kerosene for nonhighway purposes, at such retail outlet unless and until such retail dealer becomes licensed as a distributor of other motor fuel. Storage tanks or pumps located at all such retail dealers' place of business which are used or to be used in storing and dispensing kerosene for lamps, stoves, heaters and domestic purposes shall bear the label "not for highway use" of letters of not less than four inches in height.

When other motor fuel on which the full ten cents per gallon tax has been paid has been delivered to a retail dealer for sale or to a consumer for use as motor fuel for operating a motor vehicle upon the highways of this state, the distributor of other motor fuel who

made said tax payments and deliveries may pick up and return to his bulk storage facility any portion of such other motor fuel which may be unused and claim credit for the amount of tax paid on the quantity so returned. In order to claim credit for the tax on the quantity of other motor fuel to be so returned, such distributor shall notify, in writing, the comptroller of his desire to so return it. Immediately upon receipt of such notice, the comptroller shall direct a representative to the place of business of the distributor to supervise the transaction. Said representative shall report to the comptroller the number of gallons so returned.

[APPENDIX L]

Mississippi Code of 1972:

§ 27-59-11. Levy of tax.

(1) A tax at the rate of eight cents per gallon is hereby levied upon any distributor, as defined herein, for the privilege of engaging in such business, who shall sell or deliver liquefied compressed gas for use in propelling motor vehicles on the highways of this state; except (1) when the sale or delivery of such liquefied compressed gas is made to persons or concerns who are holders of valid Class 1, or Class 2 users permits; or (2) when the sale or delivery of such liquefied compressed gas is made to persons or concerns who are holders of valid Class 3 users permit and such fuel is withdrawn from the users bulk storage tanks for both highway and nonhighway purposes.

(2) When liquefied compressed gas, on which the full eight cents tax has been paid, for use on the highways, has been delivered to a retail dealer for sale or to a consumer for use as a motor fuel for operating a

motor vehicle upon the highways of the state, the distributor making said tax payments and deliveries may pick up and return to his bulk storage any portion of such liquefied compressed gas which may be unused as a motor fuel and claim credit for the additional amount of tax paid on the quantity so returned to bulk storage. In order to claim credit for the tax on the quantity of liquefied compressed gas so returned to bulk storage, the distributor shall notify the comptroller of his desire to return the liquefied compressed gas to bulk storage. Immediately upon receipt of such notice, the comptroller shall direct a representative to the place of business of the distributor to supervise the transaction. Said employee shall report to the comptroller the number of gallons returned.

(3) Any person who shall, while not licensed as a distributor, sell or deliver to persons or firms, any liquefied compressed gas upon which the tax hereunder has not been paid and which such person knows, or has reason to know, is to be used or sold for a taxable purpose shall be liable for the tax and penalties imposed by this chapter.

[APPENDIX M]

[106] EVERARD BAKER, next witness called by the Motor Vehicle Comptroller, having been first duly sworn, was examined and testified as follows, to-wit:

Examination by Mr. Coker:

Q. State your full name, please, sir.

A. Everard Green Baker, Jr.

Q. Where do you live, Mr. Baker?

A. Starkville, Mississippi.

Q. What occupation or business are you in?

A. I am the Assistant State Chemist, Director of Petroleum Products Laboratories.

Q. What education and training do you have to be a State Chemist?

A. I have a Chemical Engineering degree from Mississippi State and an MCHE degree from the University of Louisville, Speed Scientific School.

Q. How old are you?

A. Fifty-one.

Q. Mr. Baker, are you familiar with certain petroleum products, and particularly I wish to refer to diesel and propane.

A. Yes, sir.

Q. Can you tell us where these products are derived from?

A. From crude oil or with natural gas taken from natural reservoirs within the ground.

Q. Starting with propane first, how is it most commonly produced for commercial purposes?

A. One source is from what is known as wet natural gas. Natural gas taken from a well goes to a gas processing [107] plant which the lighter carbons, heavier than methane, are separated for other than natural gas purposes.

Q. The natural gas that is left, what is the molecular construction of the gas?

A. Natural gas, dry natural gas, the finished product of the gasoline client, contains one carbon atom, and four hydrogen atoms—a one to four atomic ratio, a twelve to four weight ratio.

Q. You mentioned methane.

A. Yes, methane is another name for natural gas.

Q. What is the next product with a different carbon atom?

A. The next methane, natural gas, is the smallest molecule of all the hydrocarbons. The next largest molecule contains two carbon atoms and six hydrogen atoms, a carbon to hydrogen ratio of two to six and a weight ratio of twenty-four to six.

Q. What do we call that?

A. This is called ethane.

Q. What is the next product that is extracted?

A. The next is propane, containing three carbon atoms, eight hydrogen atoms.

Q. With regard to diesel fuel, sometimes called No. 2, what is the source of that?

A. Diesel fuel comes from oil wells—crude oil wells—a naturally occurring product or it may come from a refined product—the result of processing of naturally occurring crude.

Q. What is the molecular structure of this fuel?

A. Diesel is basically a larger molecule than—it is of [108] the same series of chemical compounds but a bigger molecule and possesses some significant differences in structure. It will be a mixture of many, many compounds. We have characterized diesel by saying it has an average structure containing sixteen carbon atoms and thirty-four hydrogen atoms. There may be many, many different kinds of compounds with significantly different physical and chemical properties within what we call diesel.

Q. Now, does diesel normally have any other compound in it, such as sulphur, for instance?

A. Yes, sir, it contains the element sulphur—it may contain the element sulphur in compound forms that we refer to as mercaptans.

Q. What particular property do mercaptans have that is significant?

A. They have an offensive odor.

Q. What significance, when used in burning, would the different molecular structure of diesel as opposed to propane have?

A. The larger the molecule, the more carbons in a molecule, the more difficult it is to burn the compound in a clean fashion—that is, to produce only carbon dioxide and water—two products. The bigger the compound, the bigger the molecule, the more difficult this is to do.

Q. So as found in normal state, I will ask you whether or not there is any significant difference as far as clean burning is concerned between diesel and propane as normally used.

[109] BY MR. DUNN: We object to that "as normally used." I can't see the probable relevance of this in any context but if he is going to ask any question at all, it ought to be related to the use of this material as heating fuel for an asphalt plant.

BY MR. COKER: We wish to show what significant differences there are in the two fuels in all aspects.

BY THE COMPTROLLER: I will overrule the objection.

Q. Go ahead and answer.

A. The higher the molecular weight, the bigger the molecule, the greater the tendency to produce partially burned products—partially oxidized products—carbon monoxide, a whole raft of different kinds of chemical compounds which the combustion people generally refer to as aldehydes. This includes a lot of different compounds, some of which are not aldehydes at all but for the sake of simplicity, they are all classified or grouped together as aldehydes. These are partially oxidized compounds. In the oxidation process, the first step is to produce an alcohol. The second step is to produce an aldehyde; the third step is to produce an acid and the fourth step takes the oxidation process to carbon dioxide and water. So by way of simplifying this mass of partially oxidized materials, we group all of these and simply refer to them as aldehydes—partially burned, partially oxidized materials.

At the temperatures in most combustion operations, [110] the big molecules crack and sometimes produce elemental carbon which, of course, is soot to the average layman, or just smoke, and this is normally what we see when we look at combustion products. Have I gone far enough?

Q. As between the two fuels, which one produces the most of these elements?

A. Once again, you are phrasing this question as the usual average type thing?

BY MR. DUNN: We object to the usual average type thing. It has no connection or relevancy to what we're talking about.

BY MR. COKER: It has a relevancy, I will state to the Court.

BY THE COMPTROLLER: I will overrule the objection.

A. Diesel, I would have to say, does burn the dirtiest.

Q. Now, will you tell us what the physical properties are in regard to diesel and in regard to propane?

A. There are a number of physical properties we could talk about. I will start with vapor pressure. Propane has an extremely high vapor pressure.

Q. What do you mean by vapor pressure?

A. We generally define vapor pressure in laymen's terminology as the ease with which a liquid vaporizes. Propane vaporizes quite easily, as manifested by the fact that it has a boiling point of approximately minus forty-four degrees Fahrenheit. It does not exist under atmospheric pressure as a liquid. Diesel, of course, exists as a liquid under atmospheric pressure and temperature. Propane is a pure substance and hence has a [111] single boiling point—minus forty-four degrees Fahrenheit. Diesel, being a mixture of a great many compounds, has a range of boiling points beginning somewhere over plus one hundred degrees Fahrenheit and depending on the grade of diesel, may extend above seven hundred degrees at its boiling point. At room conditions, it has a vapor pressure of less than four pounds per square inch. So much for vapor pressure if that satisfies.

Q. With regard to handling the fuels, what significance does that have?

A. It simply means that in handling propane, you have to do it under pressure, which means that you have to have equipment that meets ASME Boiler Code specifications—pressure vessel specifications—excuse me.

Q. With regard to diesel fuel?

A. With regard to diesel fuel, a standard fifty-five gallon drum or for a short period of time, an open bucket suffices.

Q. With regard to the expense of installation for handling these two fuels, which one is the more expensive?

A. I can answer that only in a general way, sir, and that is to say - - -

BY MR. DUNN: I object to that. He is not qualified as an expert on handling. He is a chemist and not a handler of this material.

BY MR. COKER: He can tell us what he knows.

BY MR. DUNN: He hasn't said he is qualified on it.

BY THE COMPTROLLER: I'm going to overrule it and what he tells us will be just his opinion [112] as a chemist.

A. Any substance that must be handled under pressure which, of course, must meet ASME Pressure Vessel Specifications, the capital investment is bound to be high.

Q. As between these two fuels, I ask you whether or not both of them are suitable for cooking purposes in homes?

A. They may be.

Q. Would you explain that answer?

A. So far as I know, there are no household cooking vessels designed for routine commercial usage in the home.

Q. Why would that be?

A. Odor is a problem.

Q. With which fuel?

A. With the diesel. Otherwise, I know of no reason burners could not be adapted for the purpose.

Q. Are there any agricultural usages to which propane can be applied and which diesel cannot be used for?

A. Propane has been used, and here, sir, I would like to substitute another term for propane and simply say liquid petroleum gasses, if I may.

Q. All right.

A. Liquified petroleum gasses have been used for weeding—for removing of weeds from the field for cultivation purposes.

Q. Can diesel be used for that purpose?

A. I cannot say for certain. I do not know of its ever being used.

Q. Would there be any inherent danger in using diesel as opposed to propane or LP gasses for that purpose?

[113] A. The flame temperature from diesel may be a little bit too hot.

Q. Now, back through the years, we have observed various oil fields that had big flares going. What was being burned in those flares?

A. Out in the oil fields, the market for gaseous hydrocarbons in years gone by was not very great and these gasses—these hydrocarbons—were burned in the field as a safety measure.

Q. Are they burned today, normally?

A. Normally, no, sir.

Q. What do they do with them?

A. Today they are collected and the methane separated and sold as dry natural gas, the higher molecular weight sold as propane, butane, etc.

Q. All right. I think the Court can take judicial knowledge but I'll ask you whether or not today in the U.S. there is a fuel shortage.

A. Yes, sir, there is.

Q. You said, I believe, that diesel fuel usually came in crude oil?

A. Yes, sir.

Q. Will you explain the process by which it is extracted from the crude? What is made from crude oil?

A. Let us start by defining crude oil, for the purposes of this question, as containing little or no gaseous hydrocarbons. Let's assume that the crude oil contains nothing less than a five carbon molecule and the oil, depending upon its source, would have oil whose molecules [114] range from five carbon atoms to extremely long chains. Chains as high as seventy-five or so have been identified. This crude oil enters a refinery and normally, the first thing that happens to it is to pass through a simple distillation column in which the crude is separated into several fractions, the fraction of lowest boiling point known as straight run gasoline, and you may have a fraction we call naphtha and you may have a fraction we call kerosene, and gas oil which contains the chemical components of diesel, and a bottoms product, probably.

Q. What is that last term?

A. Bottoms product—the bottom of the barrel—in the industry, just simply known as the bottoms product. The boiling point of each of these components increases as you go down the list which I gave you. The diesel fuel is a part of that fraction which I referred to as gas oil, which may then be produced in another distillation column by simple distillation.

Diesel fuel also is produced from other refining steps such as thermo-cracking, etc., but the basic diesel comes from straight simple distillation of crude oil.

Q. Where does another oil such as what is called four and five bunker oil come from?

A. They are components of higher boiling points which may be taken off of simple distillation products. They are also produced directly from the bottoms product of some distillation towers.

[115] Q. What is the relationship between the No. 2 and the lower grade oils?

A. They generally have a higher distillation end point—ASTM distillation temperature end point.

Q. In the normal refining process, can No. 4 and No. 5 bunker oils be produced?

A. In a normal refining operation?

Q. Yes, sir. When you take a No. 4 or No. 5 oil and you don't want to sell it as that, what do you do with it?

A. It may be run back through what is known as catalytic cracking units or thermo-cracking units. The thermo-cracking units this day in time are not

nearly as prevailable as they were twenty-five or thirty years ago.

Q. Did you say that these lower grade oils will be produced in just normal refining methods?

A. A certain amount of them, yes, sir, and depending upon the refinery, they can sell at that grade or they can be run back through the cracking process and be sold as something else. That's their choice.

Q. Mr. Baker, I don't know whether you know this but I will ask you—are you familiar at all whether any other states or communities are encouraging the use of LP gas as opposed to diesel as a fuel?

A. There are some investigations going on in various places around the nation along this line. The Chicago Transit Authority ran a rather extensive survey in which they converted a number of their bus vehicles to LP gas on an experimental basis. I do not know whether or not they followed on this. All I know is the results of [116] the investigation.

Q. What were the results of the investigation?

A. The results of this investigation overall—that is, including the price of the fuel, the operation of the vehicles and the maintenance of the vehicles—they concluded that as long as there was a four cent differential price per gallon, LP gas was more economical. The vehicles operated satisfactorily on both fuels, the maintenance was considerably less on LP gas, the cost of the installation of carburetor equipment, of course, was considerable in terms of the number of vehicles, but they concluded that the use of LP gas as a motor vehicle fuel was desirable or economical to them when everything was considered, so long as they could obtain a four cent differential in price.

Q. Did the polluting effects of the fuel have anything to do with the study being made?

A. Again, I cannot answer that question.

Q. If I understand you correctly, depending on the combustion mechanism, as to how much cleaner one fuel would burn than the other, if given the same combustion chamber, the diesel is the cleaner burning fuel, is that correct?

A. The same burner will not burn the two fuels satisfactorily without modification. I won't say you could burn the two fuels in the same burner.

Q. You misunderstand my question. Given two combustion chambers built to the same degree of efficiency for the two fuels, which will burn the cleaner?

[117] A. I will have to say LP gas.

BY MR. COKER: I believe that's all.

Cross Examination by Mr. Dunn:

Q. Mr. Baker, I don't know where we've been or where we are going but I'm going to enter in the spirit of this very briefly. Take this last question here. He asked which would burn more efficiently and you hesitated and said, "I will have to say LP gas". Do you mean by that that the difference is insignificant?

A. No, sir, I did not mean that.

Q. What did you mean?

A. There are a great many factors that determine how clean a fuel burns and the way the question was phrased, I had no alternative except to say LP gas. May I elaborate a little?

Q. Well, if you don't elaborate at too great a length.

A. The bigger the molecule that you are burning, the more difficult it is to burn that thing in a clean fashion and if you have two combustion chambers designed for the fuel it is being used for, they are going to operate to the best of the designer's ability to do so. But the diesel fuel, because of the higher molecular weight, because of the presence in most instances of sulphur, is going to produce more pollutants, which is my way of saying it burns dirty.

Q. Is that assuming equal efficiency of the burners, properly designed for each material?

A. In the industry, it is a generally accepted fact—and I have in my briefcase the location of this date—that [118] the burning of LP gas on a heat basis is always more efficient.

Q. You mean from the standpoint - - -?

A. Of the heat value.

Q. Of the heat value?

A. Of the fuel, yes.

Q. Are you familiar with the burning of diesel and the burning of propane in connection with the heating of aggregate for use in asphalt plants?

A. I am not especially familiar with asphalt plants, no sir.

Q. These questions that were asked you were framed on the basis of the average use of this material. Now, would you place the use of this material in burners such as I have described in the category of the average use?

A. Yes, sir.

Q. What is a use that is not an average use?

A. If you take any single use and segregate it from the bulk of the field, if that it not an average use, on that basis, yours is not an average burner.

Q. There is quite a difference in putting this fuel in an automobile and fixing up your carburetor to handle it and putting it in a machine and putting it in a burner that is using thousands of gallons of this stuff being used as a heating agent, is there not?

A. That's the primary purpose of the internal combustion engine, sir.

Q. I don't know whether you are trying to testify about the relative efficiencies of the fuel or whether you are [119] testifying on some ecological basis.

A. I am not testifying on an ecological basis, no, sir.

Q. You are testifying here on the basis of the relative efficiency of the two fuels?

A. My statement about the heating value, is that what you are referring to?

Q. Yes, sir.

A. Yes, that is on the heating value—the BTU content—and I am not referring to internal combustion engines there. That is in furnaces which should, in my opinion at this point, approximate an asphalt unit.

Q. So I gather, from what you say there, that if you were obliged to operate an asphalt plant, you would select the propane as distinguished from the diesel?

A. Not necessarily, sir. There are other factors to be taken into consideration.

Q. As for instance?

A. The cost of the equipment, the ready availability of the fuel, where you are going to be locating and any number of things that could be and should be taken into consideration.

Q. So that in relation to the use of these two fuels or the selection of one fuel versus the other in connection with the operation of an asphalt plant, you don't seek to qualify yourself as an expert on that aspect of it?

A. No, sir.

Q. Do you know what type of equipment is placed on these asphalt plants for the purpose of pollution control?

A. No, sir, I do not other than as a competent chemical [120] engineer ought to know. I am not familiar with the specific equipment.

Q. You're just not familiar with the operation of asphalt plants?

A. No, sir.

Q. You do not know what the asphalt plant is equipped with?

A. I do not know the specific equipment, no, sir.

Q. Diesel fuel, is that the same as kerosene?

A. No, sir.

Q. There is a difference?

A. There is a difference.

Q. I guess I ought not ask you this, but what is the difference?

A. The difference is in the size of the molecules that make up the material. Kerosene is a lower molecular weight and a shorter chain of hydrocarbons than diesel.

Q. Are the two fuels interchangeable in use?

A. To some extent.

Q. What is this—I don't know whether you're old enough to know about this—what is this we used to burn in the oil lamps?

A. Yes, sir, I grew up on one. I studied by one.

Q. Those were called kerosene lamps.

A. That's right.

Q. They burned kerosene?

A. Yes, sir.

Q. That was quite a familiar sight at home. Didn't have any propane back in those days. You were asked about—this is diesel oil that's called No. 2 oil, isn't it?

[121] A. There are several grades of what we call diesel.

Q. I believe the law refers to diesel as No. 2 oil. There are a number of other grades of oil below that such as three, four, five and six?

A. Yes, sir.

Q. Where do you get the bunker oil from?

A. The lower end of that schedule.

Q. About No. 6?

A. Yes, sir, or even heavier.

Q. Now, this word "dirtier" that you used. Which is the dirtier? No. 2 or No. 3?

A. They are dirtier in relationship to how they burn—not the material itself.

Q. That's what I mean—the dirtier as to burning.

A. The higher the molecular weight, the higher fuel oil number, under essentially equivalent conditions, the more dirty the combustion products would be.

Q. So as you go from No. 2 to three and four and five and six, the dirtiness increases?

A. Yes, sir.

BY MR. DUNN: That's all, thank you.

[APPENDIX O]

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OCTOBER TERM, 1975

No. 75-1250

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vs.

ROBERT G. SHARPE, MOTOR VEHICLE COMPTROLLER, STATE OF MISSISSIPPI,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss this appeal on the ground that it does not present a substantial federal question, and that certain of the contentions of appellant were not timely or properly raised; alternatively, appellee moves the Court to affirm the judgment of the Supreme Court of Mississippi on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to require further argument. Appellee further moves the Court to award damages pursuant to Rule 56(2) of the rules of this Court.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

On this appeal Standard Oil Company questions the validity of one of the Mississippi petroleum fuel tax statutes, § 27-55-313, Miss. Code Ann. (1972) (App. K).

The statute, § 27-55-313, in pertinent part levies a tax at the rate of ten cents per gallon on distributors of "other motor fuel" (including diesel fuel) for the privilege of selling or delivering the fuel to persons for use in performing construction contracts for the State of Mississippi or its agencies or political subdivisions. The specific pertinent language of the statute is,

> A tax at the rate of ten cents per gallon is hereby levied upon any distributor of other motor fuel . . . for the privilege of engaging in the business of selling and delivering other motor fuel to any other person who purchases or uses other motor fuel in performing contracts for construction . . . where such contracts are entered into with the State of Mississippi or any department, agency, or institution . . . .

B. The Proceedings Below

The Mississippi Motor Vehicle Comptroller, charged with administering the petroleum fuel tax statutes, assessed taxes and penalties in the sum of $198,543.26 against Standard Oil Company (a distributor under § 27-55-313) for diesel fuel sold by Standard to Mid-State Paving Company for use in the performance of

State Highway Commission contracts. The assessment was confirmed by an order of the Motor Vehicle Comptroller, entered after a full evidentiary hearing (App. E).

On appeal by Standard to the Chancery Court of Hinds County, the order of the Motor Vehicle Comptroller was reversed. The decision of the Chancellor was made on a point of statutory interpretation, and he specifically refrained from considering any constitutional issue (App. F, A36).

The Motor Vehicle Comptroller appealed to the Supreme Court of Mississippi. That Court reversed the Chancellor, holding adversely to Standard on both the statutory interpretation and constitutional points (App. G). See *Sharpe* v. *Standard Oil Co.*, 322 So. 2d 457 (Miss. 1975). This appeal by Standard followed.

II.

ARGUMENT

A. The Case Presents No Substantial Question Not Previously Decided By This Court.

Standard Oil Company contended that the specific fuel in question in this case was used by Mid-State Paving Company exclusively in asphalt plants for drying sand, and that it was not used in vehicles (App. B, A5). This alleged restricted use formed the basis for a statutory interpretation argument which was the chief contention of Standard through the State Supreme Court level of this case. Standard's contentions regarding use of the fuel were not borne out by the evidence, however. Following a full evidentiary hearing, the Mississippi Motor Vehicle Comptroller found as a mat-

ter of fact that the fuel was in many cases used generally by Mid-State (App. E, A17).

The primary constitutional grounds urged by appellant are alleged violations of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. These contentions were fully examined and correctly rejected by the Supreme Court of Mississippi. The portion of that Court's opinion dealing with these contentions follows:

> Standard's final contention involves a constitutional challenge. The argument is that to subject diesel fuel to the tax, when used as a heating agent, is discrimination violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution because other heating fuels, notably propane, are not subject to the disputed tax. The tax, it is urged, would increase the cost of diesel fuel to such proportions that Standard's business of selling diesel fuel for use as a heating agent would be destroyed in the same manner as the business in *Riley* v. *Ayer and Lord Tie Co.*, 147 Miss. 105, 113 So. 214 (1927). In *Riley* a privilege tax of twenty-five cents per thousand feet of lumber treated by creosoting plants was held to violate the equal protection clause because the taxpayer's whole business was destroyed by the tax, other like businesses not being so taxed. *Riley* is not dispositive of the constitutional question before us, for while the entire production of the creosoting business was taxed in that case, only one specific use of one specific product is being taxed in the instant case: The use of diesel fuel by a contractor to heat asphalt to be used in the performance of a state contract.

Subtle distinctions are, of course, not controlling on this constitutional matter. The correct inquiry is whether the classification is related to a legitimate state interest and, if so, whether the means chosen to effectuate that interest are reasonable. *Kahn* v. *Shevin*, 416 U.S. 351, 355, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959); *Ohio Oil Co.* v. *Conway*, 281 U.S. 146, 50 S.Ct. 310, 74 L.Ed. 775 (1930); *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989 (1920); *State* v. *Paramount-Gulf Theaters, Inc.*, 226 Miss. 404, 84 So.2d 403 (1956); *Southern Package Corp.* v. *State Tax Commission*, 174 Miss. 212, 164 So. 45 (1935). Nowhere is the power of classification accorded more latitude than in the field of taxation. While subject to the demands of the Fourteenth Amendment, "that Amendment imposes no iron rule of equality . . . ." *Ohio Oil Co.* v. *Conway*, *supra*, 281 U.S. at 159, 50 S.Ct. at 314, 74 L.Ed. at 782. *Accord*, *Allied Stores of Ohio, Inc.*, *supra*, 358 U.S. at 526, 79 S.Ct. at 440, 3 L.Ed.2d at 484; *New York Rapid Transit Corp.* v. *New York*, 303 U.S. 573, 578, 58 S.Ct. 721, 82 L.Ed. 1024 (1938). The state may tax certain kinds of property yet exempt others. *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245, 255, 43 S.Ct. 83, 67 L.Ed. 237 (1922).

The United States Supreme Court has addressed the instant classification problem on several occasions. *Heisler*, *supra*, concerned a state taxing statute which levied a tax on anthracite coal production. Suit was brought alleging that the tax violated the equal protection clause because anthra-

cite coal was taxed while bituminous coal was not taxed. The Court held that the natural difference between the two coals constituted a "just basis for their different classification," and accordingly, upheld the tax. 260 U.S. at 257, 43 S.Ct. at 85, 67 L.Ed. at 242. *Lake Superior Consolidated Iron Mines* v. *Lord*, 271 U.S. 577, 46 S.Ct. 627, 70 L.Ed. 1093 (1926) involved a like tax levied upon ore lands but not upon other producing lands such as quarries and forests. Citing *Heisler, supra*, the Court affirmed the tax classification on the basis of the differences in the natural resources. 271 U.S. at 582, 46 S.Ct. at 629, 70 L.Ed. at 1101. In *Broad River Power Co.* v. *Query*, 288 U.S. 178, 53 S.Ct. 326, 77 L.Ed. 685 (1933), a suit was filed contesting the validity of a South Carolina law that taxed the production of electricity by hydroelectric power but not the production of electricity by oil or internal combustion engines. Again citing *Heisler, supra*, the Court held that the existence of comparatively few internal combustion electric plants was sufficent reason for creating the tax classification. 288 U.S. at 179-80, 53 S.Ct. at 327, 77 L.Ed. at 686. *See also Allied Stores of Ohio, Inc., supra.*

The foregoing demonstrates that no constitutional difficulties are raised by the fact that, within the tax classification of "other motor fuel [used] in performing contracts . . . with the state," the tax is applied to diesel fuel used by a contractor as a heating agent. The record shows that the state interest behind the tax is the prevention of "double dipping." The means chosen to halt this practice is the termination of all refund and ex-

emption privileges for contractors using gasoline and other motor fuel in the performance of state contracts. In this way the contractors may recover their fuel tax cost but once through the contract bid and not a second time by way of a refund or exemption.

Finally, apart from the pronounced state interest in ending "double dipping," a more basic reason may be relied upon to sustain the discrimination between propane and diesel, specifically the inherent differences between propane and diesel fuel. These differences were testified to by a witness for the Comptroller and form in and of themselves a sufficient basis for the tax classification. *Heisler, supra*, 260 U.S. at 257, 43 S.Ct. at 85, 67 L.Ed. at 242; *Allied Stores of Ohio, Inc., supra*, 358 U.S. at 528, 79 S.Ct. at 441, 3 L.Ed.2d at 486. 322 So. 2d at 460-61.

The witness referred to by the Supreme Court of Mississippi was Everard Green Baker, Jr., Assistant State Chemist, Director of Petroleum Products Laboratories of Mississippi. He held a Master of Chemical Engineering degree. He testified in detail regarding the inherent differences between propane and diesel fuel. The two fuels have vastly different molecular structures. Diesel fuel contains sulphur compounds which have an offensive odor. Diesel fuel burns "dirtier." The vapor pressure of propane is much higher, requiring that it be contained in expensive pressure vessels, whereas diesel fuel can be carried in an ordinary lard bucket. Propane is suitable for cooking. Diesel fuel is not. Propane has specialized agricultural uses, whereas diesel fuel does not. Propane was previously "flared" or

wasted in the oil fields, but due to the current fuel shortage, it and other gaseous hydrocarbons are now collected and marketed. Various governmental units in the United States are now encouraging the use of propane and similar fuels, for their nonpolluting qualities (App. M).

It is settled law that where no substantial federal question is raised on appeal to this Court, the appeal must be dismissed. See *Palmer Oil Corp.* v. *Amerada Petroleum Corp.*, 343 U.S. 390 (1952); *Zucht* v *King*, 260 U.S. 174 (1922). In light of the line of cases cited by the Supreme Court of Mississippi, the question attempted to be raised by Standard cannot be considered substantial. Contrary to the contentions of Standard, there are strong precedents in support of the constitutionality of state statutes taxing certain kinds of property and exempting others. The *Allied Stores*, *Broad River Power*, *Lake Superior Consolidated*, and *Heisler* cases cited by the Supreme Court of Mississippi are representative of these. Standard's contentions have been many times rejected by this Court.

In *Gurley* v. *Rhoden*, 421 U.S. 200 (1975), the petitioner made a more credible Fourteenth Amendment equal protection argument than that made by appellant here. This Court stated of that argument, "The contention is patently frivolous." 421 U.S. at 212. The effect of that decision was to uphold a Mississippi sales tax statute.

The primary case cited and relied on by appellant is *WHYY, Inc.* v. *Borough of Glassboro*, 393 U.S. 117 (1968). That case involved discrimination against a foreign corporation solely because of its locus of incorporation, and is clearly no help to Standard on this

appeal. Standard's next-best case is *Riley* v. *Ayer & Lord Tie Co.*, 147 Miss. 105, 113 So. 214 (1927). *Riley* was quite thoroughly distinguished by the Supreme Court of Mississippi in the quote above, and does not, appellee submits, require further attention.

B. The Appellant Cannot Raise In This Court New Constitutional Issues.

In its jurisdictional statement, Standard at this level attempts to raise Fifth Amendment and Commerce Clause issues. As will be shown, these issues have never been timely raised at any previous level.

In the stipulation which formed a part of the record at the hearing before the Motor Vehicle Comptroller, Standard raised only a Fourteenth Amendment equal protection and due process question (App. B, A7). The order of the Motor Vehicle Comptroller discussed only Fourteenth Amendment equal protection and due process (App. E, A20). The opinion of the Chancellor, while it decided no constitutional question, mentioned only Fourteenth Amendment equal protection and due process (App. F, A36). The Supreme Court of Mississippi, as shown by the quotation above, mentioned only Fourteenth Amendment equal protection.

It was not until Standard filed a petition for rehearing before the Supreme Court of Mississippi that it made a passing reference to the Fifth Amendment, and not even then was the Commerce Clause mentioned.

In review of a state court decision, this Court will not review a federal question raised before it for the first time. *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973); *Hill* v. *California*, 401 U.S. 797, 805 (1971); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969) (collecting cases).

An attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late. *Herndon* v. *Georgia*, 295 U.S. 441 (1935). The Mississippi Supreme Court will not consider a constitutional issue not raised in the trial court. *Stewart* v. *City of Pascagoula*, 206 So. 2d 325, 328 (Miss. 1968). Of course, the Fifth Amendment due process clause only applies to the United States, and not to the individual states. *Taylor* v. *United States*, 320 F.2d 843 (9th Cir. 1963), *cert. denied*, 376 U.S. 916 (1964).

Thus it appears clear that appellant cannot raise its Fifth Amendment and Commerce Clause issues at this point. In any event, appellant's jurisdictional statement cites no Fifth Amendment or Commerce Clause cases even remotely on point, and its contentions under those portions of the Constitution do not rise to the level of substantial federal questions.

III.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, appellee respectfully submits that the questions upon which this cause depends are so insubstantial as not to require further argument, and appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Mississippi. Appellee further moves the Court to award damages pursuant to Rule 56(2) of the rules of this Court.

Respectfully submitted,

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CONSTITUTIONAL PROVISION

Fourteenth Amendment, Constitution of the United States 3, 4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1250

STANDARD OIL COMPANY,
Appellant,

vs.

ROBERT G. SHARPE, MOTOR VEHICLE COMPTROLLER, STATE OF MISSISSIPPI,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

RESPONSE OF APPELLANT TO MOTION TO DISMISS OR AFFIRM

Appellee does not even attempt to respond on the merits of appellant's Constitutional claims, but is content to quote from the opinion of the state court and follow this with the ipse dixit that the state court "correctly rejected" appellant's Constitutional claims and that appellant's contrary contentions are "patently frivolous". There is no way to respond to this except to say simply that it isn't so.

The argument that appellant's customers may have used some of the fuel in vehicles instead of as a heating agent is outside of the Constitutional issue, because the tax is not challenged except as applied to No. 2 oil which was

in fact used as a heating agent in manufacturing asphalt, and there is no question at all but that the fuel in vast quantities was so used.

At most, appellee points to the testimony of Everard Green Baker, Jr. as supplying testimony on which the rank discrimination can be justified. Anticipating this, the transcript of this man's testimony was included in full in the Appendix to the Jurisdictional Statement. (Apx. A56, et seq.) This witness simply claims nothing factually which could possibly justify the destructive discrimination so apparent from the face of the tax statutes, which doubles the price of one fuel and omits any tax on the competitive fuel.

As against these vague argumentative assertions, it is to be noted as significant that appellee does not assume to attack the basic truisms on which appellant's Constitutional claims are founded.

Appellee does not challenge the fact that the imposition of the tax would completely destroy the business of selling No. 2 oil for use as an industrial heating agent or the fact that the tax, once understood as being imposed by law, could never produce revenue or be of any fiscal significance to the state, because no one could afford to use it. Also unchallenged is the fact that No. 2 oil would, because of the tax, be entirely withdrawn from the flow of commerce and eliminated as a significant contribution to the production of vital industrial energy.

Discrimination is not denied, as indeed it could not be, nor is any effort made to bring the admitted discrimination within the range of reason or common sense, thereby leaving its arbitrariness exposed clearly to view.

Appellee challenges appellant's right to invoke the Commerce Clause of the Constitution and this Court's jurisdiction to consider it. It is argued that the Commerce Clause was not specifically mentioned in the state courts.[1] Cases cited are to the effect that this Court has no jurisdiction to reverse on Constitutional issues not raised in some fashion in the state courts. We respond briefly to this argument.

At the outset, it is to be emphasized that we point to the Commerce Clause as an add-on to emphasize that the federal interest in this case extends even beyond the Constitutional Due Process and Equal Protection accorded persons under the Fourteenth Amendment. The primary Constitutional violation remains firmly anchored to the Fourteenth Amendment, but the confiscatory tax, made so by invidious discrimination, deserves special attention when the result is nationalized by an interruption of the flow of commerce in the sale and use of a commodity which is as vital to industrial progress as heating fuel, especially in times such as the present.

The tax statute was distinctly challenged on the ground that it was repugnant to the Constitution of the United States. The reasons assigned, in summary, were (1) the tax would double the cost of the fuel, while closely competitive fuels were left untaxed, thereby totally destroying appellant's business of selling No. 2 oil for use as a heating agent; (2) the discrimination had no logical nexus with a state interest; (3) the tax, by reason of being priced out of use with tax added, was self-destructive and was not sustainable as a true revenue measure; and (4) the result was to destroy commerce in this area for want of the ability to sell the fuel in the market place.

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1. Standard Oil Company was the appellee in the State Supreme Court and, therefore, no specification of errors was required or appropriate, since Standard was seeking affirmance of the lower court,—not reversal.

Therefore, while the Fourteenth Amendment is the starting point, the discrimination's effect upon interstate commerce has always been prominent in Constitutional challenge. This is so because the invidious discrimination, contrary to the Fourteenth Amendment, is the obvious and inescapable cause of the burden imposed upon commerce. In short, violation of the Commerce Clause follows, as a matter of course, in the wake of the discrimination involved and fans the fire set by the Fourteenth Amendment's violation in this case and adds still another area of federal concern with the one-sided tax treatment accorded appellant by the challenged statute.

The fact that the state court singled out the Fourteenth Amendment for express mention is not the controlling point on the jurisdictional question raised by the motion of appellee. The Fourteenth Amendment challenge is alone enough to confer jurisdiction and the Court may consider related Constitutional mandates which fall within the clear intendment of the explicitly articulated challenge.

In *Braniff Airways* v. *Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 74 S. Ct. 757 (1954), the appellant relied explicitly upon the Commerce Clause in its challenge of a tax statute but on appeal turned its attention and argument to the Due Process Clause of the Fourteenth Amendment, which had not been explicitly spelled out before, but this Court held that the Constitutional challenge, though inexplicit, was sufficient to invoke the Court's jurisdiction to consider all points, saying on this point:

> "The argument upon which appellant depends ultimately, however, is that its aircraft never 'attained a taxable situs within Nebraska' from which it argues that the Nebraska tax imposes a burden on interstate

commerce. In relying upon the Commerce Clause on this issue and in not specifically claiming protection under the Due Process Clause of the Fourteenth Amendment, appellant names the wrong constitutional clause to support its position. While the question of whether a commodity en route to market is sufficiently settled in a state for purpose of subjection to a property tax has been determined by this Court as a Commerce Clause question, the bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process. However, appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented. See People of State of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 49 S. Ct. 61, 63, 73 L. Ed. 184, and cases cited; Wolfson and Kurland, Jurisdiction of the Supreme Court of the United States, 149 et seq." (74 S. Ct. at p. 762).

See also *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 49 S. Ct. 61 (1928), and *Street* v. *New York*, 394 U.S. 576, 89 S. Ct. 1354, 1361 (1969).

In passing, it is noted that the Commerce Clause was discussed, though not raised in the state court, in the case of *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245, 43 S. Ct. 83 (1922), and this is the case cited and most relied upon by the state court in the case at bar.

We continue reliance on the Due Process and Equal Protection mandates of the Fourteenth Amendment, the

violation of which has not only imposed an unconstitutional burden upon appellant in the operation of an important segment of its lawful business, but an unconstitutional burden upon commerce as well, all being undue and unreasonable burdens imposed without any counterbalancing benefits accruing to the State of Mississippi except as such may relate to a one-time-around penalty accidentally incurred as in the instance now before the Court, from which the state would become unjustly enriched[2] to the assessed extent of $198,543.26. Cf. *The Great Atlantic & Pacific Tea Company, Inc.* v. *Cottrell, Health Officer, State of Mississippi*, 96 S. Ct. 923 (1976). In like manner, the burden imposed on commerce by the tax here in question is clearly excessive in relation to the putative local benefits, which in the present case are demonstrably non-existent.

CONCLUSION

It is respectfully submitted that substantial and serious Federal Constitutional claims are presented which heretofore have not been resolved by this Court in the context of the facts here presented and that the Court should review the case in depth on this appeal and reverse the de-

2. This is especially evident in this case, because the proof shows, without dispute or conflict, that appellant's customer (Mid-State Paving Company) used the price of the fuel *without* the tax added in submitting its bid on the paving work for the state for which the fuel was used in manufacturing asphalt paving material, the result being that the state would collect twice,—once by reason of the reduced contract price and again when the tax is collected, compounded by the exaction of arbitrary penalties.

cision of the Supreme Court of Mississippi on Constitutional grounds.

Respectfully submitted,

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